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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1930

No. 563

GREAT NORTHERN RAILWAY COMPANY,
PETITIONER,

vs.

DELMAR COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 24, 1930

CERTIORARI GRANTED JANUARY 19, 1931

(35,485)

(35,485)

SUPREME COURT OF THE UNITED STATES

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[fol. a] [Caption omitted]

[fol. 1]

IN UNITED STATES DISTRICT COURT, DISTRICT OF MINNESOTA, FOURTH DIVISION

DELMAR COMPANY, Plaintiff,

vs.

GREAT NORTHERN RAILWAY COMPANY, Defendant

COMPLAINT

Plaintiff for its complaint alleges:

(1) That the Delmar Company is, and at all times hereinafter mentioned was, a corporation duly organized under the laws of the State of Delaware, with its principal office in the City of Minneapolis, Minnesota.

(2) That the Great Northern Railway Company is, and at all times hereinafter mentioned was, a corporation duly organized and authorized to operate, and was operating, a system of railroads within the States of North Dakota, South Dakota, Wisconsin and Minnesota and other territory, as a common carrier, and subject to the rules and regulations of the Interstate Commerce Commission.

(3) That the Delmar Company was engaged in the business of buying and selling grain in the City of Minneapolis for some time prior to the year 1922 and including the year 1927; that during said period said Delmar Company made certain shipments via the Great Northern Railroad, and that on such shipments said Great Northern Railway Company charged unlawful, unreasonable and discriminatory rates therefor.

(4) That on or about the 4th day of December, 1924, Delmar Company filed a complaint with the Interstate Commerce Commission against the Great Northern Railway Company, which proceedings were known as Docket No. 165761 of the Interstate Commerce Commission Records; that said proceedings were duly heard, and on the 10th day of January, 1927, an order issued by the Interstate Com-
[fol. 2] merce Commission, wherein it was found that the complainant made shipments over the Great Northern Rail-

road and paid the charges thereon, and that it was damaged thereby in the amount of the difference between the charges paid and those which would have accrued at the applicable rate, and that it was entitled to reparation with interest.

(5) That thereafter and on the 10th day of October, 1927, the Interstate Commerce Commission issued its further order in said matter as follows:

"It is therefore ordered, That the above named defendant be, and it is hereby, authorized and directed to pay unto complainant Delmar Company, on or before November 25, 1927, the sum of $648.84, with interest thereon at the rate of six per cent per annum from September 15, 1922, as reparation on account of inapplicable rates charged for the transportation of numerous carload shipments of grain from points in North Dakota, South Dakota and Minnesota to Superior, Wis."

(6) That the shipments involved, including date of shipment, car number, origin, destination, rate charged and overcharge, under and pursuant to said proceedings before the Interstate Commerce Commission and the order thereon, are listed in Exhibit "A", which is hereto attached and made a part hereof.

(7) That the said Great Northern Railway Company did not pay said sum as ordered by the Interstate Commerce Commission, and has never paid the same; and that there is due and payable to the plaintiff herein the sum of $648.84, with interest thereon from the 15th day of September, 1922.

Wherefore, Plaintiff demands judgment against the defendant herein for the sum of $648.84, with interest thereon from the 15th day of September, 1922, and for its costs and disbursements, and, in addition thereto, attorneys' fees as provided by the statute in such cases.

Shaw, Safford, Putnam & Shaw, Attorneys for Plaintiff, 826 First National-Soo Line Bldg., Minneapolis, Minnesota.

[fols. 3 & 4] *Duly sworn to by Fred W. Putnam. Jurat omitted in printing.*

(Here follows Exhibit "A" to Complaint, side folios 5 and 6)

[fols. 5 & 6]

EXHIBIT "A" TO COMPLAINT

Claim of Delmar Co., Minneapolis, Minn., under Decision of the Interstate Commerce Co

Date of shipment	Date of delvy. or tender of	Date charges were paid	Car Int.	Car No.	Origin	Destination	Route	Commodity
6/1 /1922	6/12/1922	6/20/1922	GN	11559	Albee, SD	Superior, Wis.	GN-Ry.	Corn
8/23 "	8/31 "	9/1 "	GN	24717	Burch, SD.	"	"	Wheat.
8/21 "	9/6 "	9/7 "	GN	127839	" "	"	"	"
8/31 "	9/15 "	9/16 "	GN	24799	Grover, SD.	"	"	"
9/4 "	9/15 "	" "	GN	34672	" "	"	"	"
8/22 "	9/11 "	9/12 "	GN	17426	Plana, SD	"	"	"
8/26 "	9/15 "	9/16 "	Penn	22491	Putney, SD.	"	"	"
8/22 "	9/11 "	9/12 "	GN	16337	" "	"	"	"
8/19 "	9/11 "	" "	GN	122761	" "	"	"	"
8/26 "	9/7 "	9/8 "	GN	18690	" "	"	"	"
8/25 "	9/7 "	" "	GN	124011	" "	"	"	"
8/28 "	" "	" "	GN	123988	" "	"	"	"
8/26 "	9/12 "	9/15 "	GN	205070	" "	"	"	"
5/27 "	6/7 "	6/8 "	GN	505918	Sheffield, "	"	"	Corn
8/21 "	9/6 "	9/7 "	GN	16563	Rauville, "	"	"	Wheat.
8/31 "	9/13 "	9/14 "	GN	121211	Tacoma Park, SD	"	"	"
8/21 "	9/11 "	9/12 "	GN	300101	" " "	"	"	"
9/1 "	9/13 "	9/15 "	GN	34719	Willow Lake, "	"	"	"
7/28 "	8/9 "	8/10 "	GN	125360	" " "	"	"	Corn
7/10 "	7/25 "	7/26 "	GN	124650	" " "	"	"	"
7/11 "	7/25 "	7/26 "	GN	126213	" " "	"	"	"
9/11 "	9/22 "	9/22 "	CP	290056	Holloway, Minn.	"	"	Oats
6/23 "	7/5 "	7/6 "	GN	23219	Appleton, "	"	"	Corn
7/24 "	8/1 "	8/1 "	GN	13923	Litchfield, "	"	"	"
8/30 "	9/11 "	9/12 "	WP	15167	Rogers, "	"	"	Rye
8/31 "	9/15 "	9/16 "	GN	207182	Howes Siding, ND.	"	"	Wheat.

The undersigned hereby certifies that this statement has been checked against the records of this company and found correct.
Great Northern Railway Co., Defendant, by —— ——.

Endorsed: Filed Oct. 8, Joel M. Dickey, Clerk, by Thomas H. Howard, Deputy.

Del

EXHIBIT "A" TO COMPLAINT

eapolis, Minn., under Decision of the Interstate Commerce Commission under Docket No. 16576

Origin	Destination	Route	Commodity	State weight	Rate as charged	Amount as charged	Rate should be	Amount should be	Overcharge reparation
					Total				
	Superior, Wis.	GN-Ry.	Corn	94340	13–6–19	$179.24	17½	$165.09	$14.15
	"	"	Wheat	79630	20½–6½ 27	215.	22½	179.17	35.83
	"	"	"	82310	" " "	222.24	"	185.20	37.02
	"	"	"	85910	19½–6½ 26	223.38	24½	210.48	12.90
	"	"	"	86410	" " "	224.67	"	211.70	13.97
	"	"	"	88510	21–6½ 27½	243.40	24	212.42	30.98
	"	"	"	84560	" " "	232.54	24	202.94	29.60
	"	"	"	94140	" " "	258.88	24	225.94	32.94
	"	"	"	89340	27–6½ 33½	299.29	24	214.41	84.88
	"	"	"	97470	21–6½ 27½	268.05	24	233.93	34.12
	"	"	"	87860	" " "	241.62	"	210.86	30.76
	"	"	"	90720	" " "	249.48	"	217.73	31.75
	"	"	"	72490	" " "	199.34	"	173.98	25.36
	"	"	Corn	61110	19–6 25	152.78	"	146.66	6.12
	"	"	Wheat	99600	18–6½ 24½	244.02	23	229.08	14.94
SD	"	"	"	89710	21–6½ 27½	246.70	24	215.30	31.40
"	"	"	"	87460	" " "	240.52	"	209.90	30.62
"	"	"	"	98210	20–6½ 26½	260.25	24½	240.61	19.64
"	"	"	Corn	93440	18–6 24	224.25	22	205.57	18.68
"	"	"	"	88570	" " "	212.57	"	194.85	17.72
"	"	"	"	87960	" " "	211.10	"	193.51	17.59
nn.	"	"	Oats	75000	11½–6 17½	131.25	15½	116.25	15.00
"	"	"	Corn	69110	" " "	120.95	16	110.58	10.37
"	"	"	"	74320	8½–6 14½	107.75	14	104.05	3.70
"	"	"	Rye	67650	6½–6 12½	84.56	12	81.18	3.38
ND.	"	"	Wheat	69870	17½–6½ 24	176.69	17½	122.27	45.42
									648.84

ainst the records of this company and found correct.

Deputy.

Delmar Company, Claimant, by —— ——, 502 Flour Exchange, Minneapolis, Minn.

[fol. 7] IN UNITED STATES DISTRICT COURT

ANSWER—Filed Oct. 26, 1928

Defendant for its answer to the complaint in the above entitled case alleges:

I

Admits the allegations contained in paragraphs 1 and 2 of the complaint.

II

Admits the allegations contained in that portion of paragraph 3 of the complaint down to and including the words "made certain shipments via the Great Northern Railroad" but denies the allegations contained in the balance of said paragraph 3.

III

Admits the allegations contained in paragraphs 4 and 5 of the complaint.

IV

Admits the allegations contained in paragraph 6 of the complaint but, except as admitted in paragraph VI hereof, denies the correctness of the facts stated and contained in columns headed "Rate should be" "Amount should be", and "Overcharge reparation", contained in Exhibit "A" attached to said complaint and referred to in paragraph 6 of the complaint.

V

Denies the allegations contained in paragraph 7 of the complaint.

VI

Admits the correctness of the facts stated in Exhibit "A" specifically relating to car No. 13923 originating at Litchfield, Minnesota, and car No. 15167 originating at Rogers, Minnesota, and specifically that the amounts as charged constituted overcharges with the respect to these two particular cars in the amount of $3.70 and $3.38 respectively, as set forth in said Exhibit "A" and defendant hereby makes offer of judgment in the amount of $7.08, the total amount of the overcharge of said two cars.

VII

Except as herein specifically admitted, defendant denies each and every allegation, matter of fact and thing contained in said complaint.

[fol. 8] VIII.

Further answering, defendant alleges that the rates as charged and the amounts as charged as indicated in columns so designated in said Exhibit "A" attached to said complaint were, with the exception of rates and amounts applicable to cars Nos. 13923 and 15167 referred to hereinbefore in paragraph VI of this answer, the applicable rates and charges under tariffs duly filed and published by defendant according to law.

Wherefore, defendant demands judgment against defendant, but only in the amount hereinbefore specifically admitted, that is $7.08, and that otherwise the complaint be dismissed and that defendant have its costs and disbursements.

F. G. Dorety, R. J. Hagman, Fletcher Rockwood, Attorneys for Defendant, 1120 Great Northern Building, St. Paul, Minnesota.

Duly sworn to by F. L. Paetzold. Jurat omitted in printing.

(Endorsed): Due and personal Service of the within is hereby admitted this 22nd day of October, 1928.

Shaw, Safford, Putnam & Shaw, Attys. for Plaintiff.

[File endorsement omitted.]

[fol. 9] In United States District Court

Reply—Filed Feb. 13, 1929

Plaintiff for its reply to the answer of the defendant herein:

Denies each and every allegation contained in said answer, except as said allegations admit the allegations of the complaint herein.

Wherefore Plaintiff prays judgment as in its complaint demanded.

Shaw, Safford, Putnam & Shaw, Attorneys for Plaintiff, 826 First National Soo Line Bldg., Minneapolis, Minnesota.

Duly sworn to by Fred W. Putnam. Jurat omitted in printing.

Endorsed: Service of the within Reply by delivery of copy thereof at St. Paul, Minn., admitted this 29th day of October, 1928. F. G. Dorety, R. J. Hagman, Fletcher Rockwood, Attorneys for Defendant.

[File endorsement omitted.]

[fol. 10] IN UNITED STATES DISTRICT COURT

STIPULATION WAIVING JURY—Filed April 19, 1929

The parties to the foregoing-entitled cause do hereby stipulate that a jury may be waived in said case, and that the same shall be submitted to the Court without a jury.

Shaw, Safford, Putnam and Shaw, Attorneys for Plaintiff. R. J. Hagman, J. H. Mulally, Attorneys for Defendant.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

MINUTE ENTRY OF TRIAL—April 19, 1929

April Term, 1929. Before Judge John B. Sanborn

The above entitled action came on this day to be tried to the Court without a jury, trial by jury having been expressly waived by stipulation filed herein; Messrs. Shaw, Safford, Putnam and Shaw appearing as attorneys for the plaintiff and Messrs. R. J. Hagman and J. H. Mulally appearing as attorneys for the defendant herein.

Mr. Putnam opens and states the case to the Court on the part of the plaintiff.

Here the plaintiff rests its case.

Prescott B. Beidelman is sworn, is examined and testifies as a witness on the part of the defendant.

Here the defendant rests its case.

Said action is submitted to and taken under advisement by the Court, plaintiff to file written memorandum twenty days from this date, defendant to file its reply memorandum ten days thereafter.

IN UNITED STATES DISTRICT COURT

OPINION—Filed Aug. 8, 1929

This cause came on to be tried on April 19, 1929, before the court, without a jury, a jury having been, by stipulation of the parties, waived.

Shaw, Safford, Putnam & Shaw, and Sam W. Campbell, of Minneapolis, appeared for the plaintiff; and F. G. Dorety, R. J. Hagman and J. H. Mulally, of St. Paul, for the defendant.

[fol. 11] The case involves the interpretation of a tariff filed by the defendant with the Interstate Commerce Commission. The facts are undisputed, and the only question involved is one of law.

The plaintiff brought this action against the defendant to recover $648.84 and interest, the amount of alleged excessive charges collected by the defendant in transporting twenty-six carloads of grain during the period from April 27, 1922, to September 11, 1922.

The shipments all originated at numerous points on the Great Northern in Minnesota, North Dakota, and South Dakota, were consigned by various shippers to Minneapolis, and, after arrival at Minneapolis, were reconsigned by the plaintiff in the same cars to Superior, Wisconsin, where delivery was made. The entire transportation was over the rails of the defendant. The defendant collected its local rate applicable from the country station to Minneapolis, plus its proportional rate applicable from Minneapolis to Superior. These combinations of rates were higher than the rates which the defendant's tariff specified for trans-

portation of grain from the country stations to Superior. It is the difference between the rate charged and the through rate for which the plaintiff sues.

On December 4, 1924, the plaintiff filed a complaint entitled "Delmar Company, Complainant, vs. Great Northern Railway Company, Defendant", Docket No. 16,576, before the Interstate Commerce Commission, by which it sought reparation for the same alleged excessive charges. Issues were joined in that proceeding and on January 10, 1927, the Commission issued it- report 120 I. C. C. 530), in which it found that the rates named in the defendant's tariff for transportation from the country stations to Superior were applicable via the longer route through Minneapolis, and on October 10, 1927, entered its order requiring the defendant to pay the plaintiff $648.84 with interest from September 15, 1922, as reparation "on account of inapplicable rates charged". The defendant declined to pay the reparation, and thereupon the plaintiff instituted this suit.

The plaintiff's contention is that the defendant's rate from the country stations in question to Superior applied via Minneapolis, although that was the longer route, because the tariff did not expressly restrict the application of the rate to the shorter and more direct route.

[fol. 12] The defendant's contention is that the rate published for transportation from these stations to Superior applied only over the direct and shorfer route, and not via the longer route through Minneapolis, over which these shipments moved.

The tariff naming the rate from the stations in question to Superior, at the time of these shipments, was silent as to the route over which the rate would apply, although it has since been changed so as to exclude the route through Minneapolis upon the through rate.

The defendant bases its contention on two propositions:

(1) That, under the law, where a tariff fails to state over what route a through rate is available, the law will imply that the rate applies to the shortest, most direct route.

(2) That, if it should be held that the through rate applied to these shipments, it would produce an unlawful result, because it would then appear that, under the defend-

ant's tariff, a greater charge was made for a shorter than for a longer haul; an example of which would be that there would be a higher rate from Howes, North Dakota, to Cambridge, Minnesota, than from Howes to Superior.

The defendant, in support of its contentions, cites paragraph (1) of Section 6 of the Interstate Commerce Act (49 U. S. C. A. §6) which requires carriers to file with the Commission and publish tariffs showing their charges "for transportation between different points" upon their lines, and paragraph (7) of the same section, which forbids any carrier to "extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs." It is claimed that to permit one shipper to bill his grain to Minneapolis, the primary grain market, on an indirect route, and to there sell it and have it reconsigned to Superior, would be granting privileges or facilities greater than permitted to a shipper who forwarded his grain on a through bill of lading to Superior.

The evidence here and before the Commission indicated that the practice of the defendant was to move all grain billed to Superior over the shorter, more direct route.

Were this a case of first impression, it would seem as though the contention of the defendant should be sustained. In the absence of any restriction as to route, common sense would seem to indicate that the tariff referred to the natural [fol. 13] and direct route, and did not extend to shippers the privilege of using a longer and more circuitous route. The routes from the stations in question to Superior via Minneapolis were from 12% to 23% longer than through Willmar, and moreover involved transporting these cars through crowded terminals. Obviously, the transportation service rendered by the railroad was greater than it would have been had the cars moved by the shorter route. However, it appears that the Interstate Commerce Commission has, for a considerable time, held that if it is a carrier's purpose to restrict the application of a rate to any particular route, and any reconsigning privileges authorized in connection therewith to any particular point, that must be done by clear and unequivocal language. Van Dusen Harrington Co. vs. C. M. & St. P. Ry. Co., 47 I. C. C. 59; Meeds Lumber Co. vs. Director General, 59 I. C. C. 243;

Freeman Grain Co. vs. Director General, 68 I. C. C. 559; Pioneer Lumber Co. vs. Director General, 74 I. C. C. 288; Baker-Reid Lumber Co. vs. B. & O. R. R. Co., 74 I. C. C. 489; Richardson Sand Co. vs. Director General, and C. & N. W. Ry. Co., 89 I. C. C. 555; Scott County Farm Bureau vs. A. & V. Ry. Co., 101 I. C. C. 357; Brown-Hinton Wholesale Grocery Co. vs. G. N. Ry. Co., 102 I. C. C. 237; Delmar vs. G. N. Ry. Co., 120 I. C. C. 530; Thames vs. Southern Ry. Co., 128 I. C. C. 508; Northwestern Fruit Exchange vs. G. N. Ry. Co., 128 I. C. C. 538.

I do not understand that the Commission has held that, where a through rate is published without restricting the movement to any particular route, a shipper may use any route, no matter how circuitous. In their reports, in referring to the routes in controversy, they have used the words "workable", "reasonable", "available" and "not out of route movement".

In the case of Delmar Co. vs. G. N. Ry. Co., supra, they refer to the route over which the shipments in question moved as being an "open route". Apparently by this they meant that it was an unrestricted and available route and not unduly circuitous. That would seem necessarily to follow from the conclusion which they arrived at. It is suggested by the plaintiff that the finding of the Commission in that regard is conclusive upon this court. Under Section 16 of the Interstate Commerce Act (49 U. S. C. A. §16) it would appear that it was merely prima facie evidence. However that may be, I think that the court should not in [fol. 14] this case upset that finding of the Commission. Its repeated holdings that, unless a tariff specified the route over which a through or joint rate applied, it would be deemed to apply to other available routes, seems to have become a rule of tariff construction. The question of what would be a "workable", "reasonable", "available", and "not out of route movement" route is a question of fact, about which reasonable minds might easily differ, and the best results in cases of this kind will no doubt be obtained if the Commission's judgment on such questions—which are peculiarly within their province—is adhered to by the courts. While the reasoning of Commissioner Taylor, who wrote the dissenting opinion in Delmar Co. vs. G. N. Ry. Co., supra, appeals to me as sound, I think the majority

were justified by former rulings in arriving at the conclusion which they did and which I do not feel warranted in disturbing.

I therefore find in favor of the plaintiff, that it is entitled to judgment for $648.84, with interest thereon from September 15, 1922, and the costs and disbursements of this action.

In order to preserve the rights of the defendant upon review, it is allowed an exception to the denial by this court of its motion for findings and judgment in its favor, made upon the sole and only ground that the evidence would support no other conclusion.

Dated this 8th day of August, 1929.

John B. Sanborn, U. S. District Judge.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT, DISTRICT OF MINNESOTA, FOURTH DIVISION

No. 2134. Law

DELMAR COMPANY, Plaintiff,

vs.

GREAT NORTHERN RAILWAY COMPANY, Defendant

JUDGMENT—September 5, 1929

[fol. 15] Pursuant to the Decision rendered and filed herein on the 8th day of August, 1929, it is

Ordered that judgment be entered in favor of the plaintiff in the sum of $648.84, with interest thereon from September 15, 1922, together with said plaintiff's costs and disbursements.

Dated Aug. 28, 1929.

John B. Sanborn, Judge.

Wherefore, by reason of the premises aforesaid, it is now Considered Ordered and Adjudged that said plaintiff, Delmar Company, do have and recover of and from the defendant, Great Northern Railway Company, the sum of

Nine Hundred Twenty and 27/100 Dollars ($920.27) together with its costs and disbursements in this behalf expended, to be taxed, and that it do have execution therefor.

Further Ordered that all further proceedings herein except the entry of judgment, the taxation of costs and entry of judgment therefor, be, and the same are hereby stayed for a period of Forty-two (42) days from and after this date to enable this defendant to prepare and present a bill of exceptions and make a motion for a new trial.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ORDER EXTENDING TIME TO SETTLE AND FILE A BILL OF EXCEPTIONS—Filed Nov. 18, 1929

On motion of the above named defendant,

It Is Hereby Ordered:

That the time within which a Bill of Exceptions may be settled and filed herein is hereby extended to and including the 1st day of January, 1930.

By the Court:

John B. Sanborn, District Judge.

Dated November 18th, 1929.

[File endorsement omitted.]

[fol. 16] IN UNITED STATES DISTRICT COURT

Bill of Exceptions—Filed Dec. 27, 1929

CAPTION

The above-entitled cause came on for trial, before Hon. John B. Sanborn, one of the Judges of the above-named Court, on Friday, the 19th day of April, 1929, at 10 o'clock A. M., at the Federal Building, St. Paul, Minnesota, without a jury, the said cause being transferred to the Third

Division of said Court for trial, and jury being waived by the parties.

There were present and appearing:

Messrs. Shaw, Safford, Putnam & Shaw on behalf of the Plaintiff.

Messrs. R. J. Hagman and J. H. Mulally, on behalf of the Defendant.

Thereupon the following proceedings were had, and testimony taken:

Mr. Putnam: The parties to this action have agreed to waive a jury, Your Honor, and have signed a stipulation to that effect, which is hereby filed with the Court.

The Court: That will be satisfactory.

Mr. Putnam: Your Honor, this case arises out of an order of the Interstate Commerce Commission, in which the Commission directed the payment of $648.84 to this plaintiff as reparation. The defendant in his answer has admitted the facts set forth in the complaint, so far as they refer to the actual shipments, the movement of the cars and so on, and the amount that was actually charged on the shipments. They admit that the order of the Interstate Commerce Commission to pay the money was made and they have not paid anything under that order. The issue here will be undoubtedly merely an interpretation of the tariff, and arises out of the fact that the tariff under which these movements were made specified the rate, but did not limit in any way the routes over which it moved. The contention of the plaintiff will be that a movement from points in North and South Dakota via Minneapolis, consigned to Superior, carries a direct rate to Superior, and that we would be entitled to the published rate, while they are trying to charge, or did charge us the local rate to Minneapolis, plus the proportional amount from Minneapolis to Superior, which makes the difference here involved.

[fol. 17] The Court: Then the question is, whether the through rate applies to shipments moving in that manner?

Mr. Putnam: Yes. I have here a copy of the order of the Interstate Commerce Commission, which I will ask the reporter to mark as an Exhibit.

(Plaintiff's Exhibit A marked for identification by the reporter.)

Mr. Putnam: The document now marked as Plaintiff's Exhibit A is a copy of the order of the Interstate Commerce Commission dated October 10th, 1927, which is set out in the complaint. As I understand it, there is no objection to it being filed as an Exhibit. We offer that as an Exhibit.

Mr. Hagman: No objection.

The Court: Received.

Mr. Putnam: That order refers to a former order of the Commission or finding, dated January 10th, 1927. That former order is recorded in 120 I. C. C. page 530. I have a copy of that order, which I would like to file as an Exhibit, and I will ask the reporter to mark it as Exhibit B.

(Plaintiff's Exhibit B marked for identification by the reporter.)

Mr. Putnam: We offer Plaintiff's Exhibit B which is the report of the Commission in the case of Delmar Company vs. Great Northern Railway Company. The case was submitted on March 20th, 1926, and decided January 10th, 1927, and is reported in 120 I. C. C. page 530.

Mr. Hagman: No objection.

The Court: Received.

Mr. Putnam: That, under the law as I understand it, makes a prima facie case on behalf of the plaintiff. Therefore we rest.

The Court: Very well.

Mr. Hagman: I would like, before presenting our evidence, to take a few moments to explain the theory of our case. Section 8 of the Interstate Commerce Act makes the carrier liable for a violation of the Act, and Section 13 provides for the shipper filing a complaint with the Commis-
[fol. 18] sion for a violation of the Act. Section 14 requires the Commission, after investigation, to make a report which shall include its findings of facts, on which an award of reparation is made. Then Section 16 of the Act provides that if the reparation is not paid, the shipper may bring suit in the State or Federal Court for the amount of the Commission's report, and order, and the Commission's report and order make the prima facie case. The exact language of the statute is that it shall be prima facie evidence of the facts therein stated. Now, as Your Honor knows,

the Interstate Commerce Commission does not make formal findings of facts and conclusions of law as a Court does, but their report which has been handed down, contains three different things; recitals, and conclusions of law, and findings of facts, so that one has to pick out from those, what are really findings of facts. Now, this is not very long, and I have underscored here the statements which I consider to be findings of facts as distinguished from these other things, and I believe it would be quite helpful if I would just read what I consider to be just the findings of facts.

"Complainant in No. 16576, a corporation dealing in grain at Minneapolis, Minn., by complaint filed December 4, 1924, alleges that the rates charged on wheat, corn, oats and rye, in carloads, between May 3 and September 10, 1922, from points in North Dakota, South Dakota, and Minnesota, originally billed to Minneapolis, Minnesota, and reconsigned to Superior, Wisconsin, are inapplicable. Reparation only is sought. The shipments moved over the Great Northern. Complainant paid the through rates to Minneapolis, and 6 cents on corn, oats, and rye, and 6.5 cents on wheat beyond. The direct route to Superior from the several points of origin, except Litchfield and Rogers, Minnesota, is via Willmar and St. Cloud, Minnesota. The route traversed via Minneapolis is longer. The Great Northern offers to refund admitted overcharges on the shipments from Litchfield and Rogers. The distances from points of origin to Superior, Wisconsin, over the two routes and differences, as shown by an exhibit follows:"

Then there is a table here showing the distance from each origin point, and the difference in percentage, of circuity.

"The above description is representative and does not embrace all shipments upon which reparation is asked. The tariffs of the Great Northern provide through commodity rates from points of origin to Superior and to Minneapolis. [fol. 19] The through rates were higher to Superior than to Minneapolis, except that from Howes, North Dakota, the rates to both destinations were equal. Complainant admittedly complied with the requirements of the applicable reconsigning rules.

"A specific tariff rule restricting the rate to the short route was established on September 25, 1923, after these shipments moved."

Then follows a description of the reconsigning tariff, which does not enter into our question here at all. I will not read it. There is a recital here as to what their conclusion was in interpreting this tariff, and after stating the contentions of the parties, the Commission says:

"It appears that previously it was the custom to apply the through rate only via the direct route, and to apply the proportional rate on shipments reconsigned at Minneapolis. Certain traffic difficulties and delays are encountered in moving traffic through the Minneapolis terminals that are not encountered over the short route. In the tariff naming rates to Duluth, rates to points between Minneapolis and Duluth, directly intermediate to Duluth, are higher than to Minneapolis and Duluth. Under complainant's interpretation there would be a violation of the long-and-short-haul c-ause of the fourth section of the interstate commerce act."

Now, those are all the findings, what I consider findings of facts. Then in this sentence is the Commission's conclusion.

"The route from points of origin herein through Minneapolis to Superior was an open route, and in the absence of restricted routing it must be found that the through rates to Duluth applied over the route traversed."

The plaintiff has made a prima facie case by the introduction of that order. The findings of facts that I have read, I have no quarrel with. That is what might be distinguished as findings of facts and not conclusions of law. I am introducing some evidence because some of these findings of fact are very meager and I think it would be helpful to the Court to have a little evidence to see how the Commission reached these findings, and that is my purpose in putting a traffic witness on the stand.

I might say very briefly that these shipments originated in South Da*k*oa or North Dakota and were consigned originally to Minneapolis. After they reached Minneapolis, the [fol. 20] shipper had them sent to Superior, and we col-

lected the rate to Minneapolis, plus this proportional rate from Minneapolis to Superior. Now, if these shipments had moved from the country stations direct to Superior, the rate would have been less than this combination that we charged to Minneapolis and Superior, and the shipper is asking us, and the Commission required us, to construe the tariff as permitting the rate from the country station to Superior, to be applied, when the shipment moves via Minneapolis. Our position is that the rate published from Howes, North Dakota, for instance, applies only when the shipment moves direct from Howes to Superior, and that that route would not be through Minneapolis, and that the tariff as a matter of law should be construed as meaning that the rate applies between Howes and Superior only when it goes over the direct route and not over a circuitous route, as through Minneapolis. The contention of the plaintiff is that the tariff did not say anything about what route this rate applied to, and in the absence of any such provision says that with respect to the routing, the shipper has the right to tell the Great Northern Railroad over which rails it shall take the shipment, although the route required by the shipper may be a circuitous one. I think that will give the Court an idea as to the issues. We will call Mr. Beidelman.

PRESCOTT B. BEIDELMAN, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination,

By Mr. Hagman:

(Defendant's Exhibits 1 and 2 marked for identification by the reporter)

Mr. Hagman: I desire to offer in evidence defendant's exhibit 1, which is a true and correct copy of the complaint filed by the Plaintiff in this case in the proceedings before the Interstate Commerce Commission; and the paper marked for identification as defendant's exhibit 2, which is the answer of the Great Northern Railway Company to this complaint, which was also filed before the Interstate Commerce Commission. I file these merely to show what the issues were before the Commission.

The Court: Very well, they may be received.

Q. Your name is Prescott B. Beidelman?

A. Yes, sir.

Q. Where do you live?

A. Minneapolis.

[fol. 21] Q. What is your business?

A. I am general freight agent for the Great Northern Railway Company.

Q. With offices in St. Paul?

A. With offices in St. Paul, yes.

Q. How long have you been in the service of the Great Northern Railway Company?

A. I entered the employ in the freight traffic department of the Great Northern Railway Company in 1900 and have been in the employ of that department of that company ever since.

Q. Will you state very briefly what different positions you have held in the traffic department, and the nature of your work?

A. My first position was a clerk, or as a clerk in the office of the Vice President in Charge of Traffic. After some months I was appointed Chief Clerk to the Vice President in Charge of Traffic of the Great Northern Railway Company, which position I held for a year or two, and was then transferred to the general freight office and had jurisdiction over the export and import traffic of the Great Northern Railway Company, in a clerical capacity. After some years at that, I was appointed general agent, refrigerator service, and looked after the handling of perishable freight from the traffic department's standpoint; the question of rates and charges, and also watching service in connection with the handling of those matters. During that time I did some work in miscellaneous rate matters and tariff matters, although my prime duty was with the rates and charges and service on perishable freight. In 1916 I was appointed Assistant General Freight Agent, and my work in that capacity was in connection with the construction of tariffs, interpretation of tariffs; also contact with the public in solicitation of traffic, and matters of a general nature. After the conclusion of the Federal control period, in the capacity of Assistant General Freight Agent, I devoted my time for five or six years or more to rates and tariffs, and the handling of formal complaints before the Interstate

Commerce Commission and the State Commissions, and acted in the capacity in the general office of passing upon tariff matters, and particularly with reference to the construction or interpretation of tariffs as affected by orders of the state and interstate commerce commissions. Since July first of 1928 I have had the title of General Freight Agent, and have been in general charge of all matters in the freight traffic department, and matters of tariff interpretation; matters pertaining to the establishing of new rates, [fol. 22] or to the reasonableness of rates in effect over the entire system, being submitted and handled through my office.

(Defendant's Exhibit 3 marked for identification by the reporter)

Q. Mr. Beidelman, I show you a map marked for identification as defendant's exhibit 3. Does that map correctly show the location of the Great Northern Railway Company in the states of North and South Dakota and Minnesota?

A. It does. It was prepared by our engineering department from their records.

Q. Now, there are numerous stations on this map as shown by red dots. What is the significance of those?

A. Those dots were placed on the map by our engineering department to designate the points of origin of the shipments of grain which are involved in this case.

Q. And those red dots indicate all the country stations at which the plaintiff's shipments of grain involved in this case originated?

A. Yes, the points of origin as designated in the complaint.

Q. Now, where were the plaintiff's shipments billed to in the first place?

A. Minneapolis, Minnesota.

Q. And at Minneapolis were they reconsigned to Superior?

A. They were reconsigned or reshipped to Superior, Wisconsin.

Q. And were they delivered at Superior?

A. They were.

Q. Did they move in the same cars all the way from the country stations to Superior?

A. Yes, sir.

Q. And was the entire movement from the country station until delivery was made at Superior over the rails of the Great Northern Railway Company?

A. Yes, sir.

Q. In no instance did any shipment move over any other line than the Great Northern Railway Company?

A. That is correct. The entire haul from the point of origin to Minneapolis and from Minneapolis to Superior was over the rails of the Great Northern Railway Company.

Q. And what rate did the Great Northern Railway Company collect on these shipments?

A. They collected what we term the local rate from point of origin to Minneapolis, plus what we term the proportional rate from Minneapolis to Superior.

Q. And this combination of rates that you collected resulted in a higher charge than the rate published from the country station to Superior?

A. Yes, sir.

[fol. 23] Q. I think you have worked out an example of that. Take Howes, North Dakota, which is one of the origin points shown on the map. The rate in the tariff from Howes to Superior is 17½ cents on wheat, is it not?

A. That is correct—17½ cents per 100 pounds, on wheat.

Q. And you actually collected on that shipment which moved to Superior by the way of Minneapolis how much?

A. 17½ cents on the movement from Howes to Minneapolis plus 6½ cents covering the movement from Minneapolis to Superior, or a total of 24 cents per 100 pounds.

Q. So you collected 6½ cents more when this shipment went through Minneapolis, than the rate prescribed for the movement from Howes to Superior?

A. Yes.

Q. The rate from Howes to Minneapolis is the same as from Howes to Superior—is that right?

A. That is correct.

Q. In all other instances from the origin points shown on this map, the rate to Superior is somewhat higher than the rate to Minneapolis? That is the statement of the Commission, and that is correct, is it not?

A. That is correct; that is, the direct rate from the country station to Superior is higher than the direct rate from the country station to Minneapolis.

(Defendant's Exhibit 4 marked for identification by the reporter.)

Q. Mr. Beidelman, I show you a tariff marked for identification as defendant's exhibit 4. This tariff is I. C. C. number A-5588. Is this a tariff of the Great Northern Railway Company?

A. It is.

Q. Was it filed with the Interstate Commerce Commission prior to the effective date shown on its cover?

A. It was filed prior to the effective date.

Mr. Hagman: You will not require the certification of this tariff?

Mr. Putnam: No, we concede it is the tariff.

Mr. Hagman: It is the tariff you are relying on yourself here.

Mr. Putnam: No objection to it.

Mr. Hagman: We offer it in evidence, defendant's exhibit 4.

The Court: Received.

Q. Does this tariff, defendant's exhibit 4, show the rates on grain from country stations in Minnesota, North Da-
[fol. 24] kota and South Dakota to Minneapolis and to Superior and to intermediate points?

A. It does.

Q. And also the rates from Minneapolis to Superior?

A. Yes, sir.

Q. And this tariff is the one in effect when the shipments involved here moved, is it not?

A. It is.

Q. And you have attached all of the supplements to that tariff that were in effect during the period that these shipments moved?

A. That is correct.

Q. They are a part of this exhibit 4?

A. They are supplements numbered 3, 5, 6, 7, and 9 which were in effect during the time that these shipments moved.

Q. Mr. Beidelman, I wish that you would point out as an illustration the page in that tariff which names the rate from Howes, North Dakota, to Superior, Wisconsin, on wheat.

Mr. Hagman: I am asking the witness to do that, Your Honor, because if this were a case of contract, that is the page on which the contract appears.

Q. (continued). One illustration will serve, will it not, Mr. Beidelman? They are all gotten up in the same way—they are all published in columns. It is just the same. It does not make any difference?

A. That is right. On page 6 of defendant's exhibit 4, in the index to the tariff, there is found the station Howes, North Dakota, which is shown as having index number 487. On page 43, index 487, Howes, North Dakota, is found in the second column, and in other columns on the page are shown the figures as to the rates in cents per one hundred pounds on grain from Howes to the destination points shown in the headings of the columns in which these figures as to the rates in cents per one hundred pounds appear. The wheat rates are in the second column in each group, there being the heading "Wheat and other articles listed in group E page 11." Under the column headed "St. Paul, Minnesota Transfer or Minneapolis, Minn." we find the figure 17½, which is the cent per one hundred pounds on wheat from Howes to Minneapolis. It is also the rate from Minneapolis to Howes. In other words, this tariff by reference to the headings on page 43, shows that the rates apply between the points of origin shown in one column and the destinations as shown in the other columns. Now, on the same page is found opposite index 487, Howes, the figure of 17½, but that is under the heading at the top of the page "Duluth, Minn., or Superior, Wis.", that rate of 17½ cents being the rate applicable on wheat between Howes, North Dakota, and Superior. I also want [fol. 25] to mention that under the words "St. Paul, Minnesota Transfer or Minneapolis, Minn.", as shown at the heading of the column, is a clause reading, "See notes 1 to 16, pages 13 to 17," the same notation appearing under the heading in the other column following the words "Duluth, Minn. or Superior, Wis."

Q. Is there anything in this tariff, Mr. Beidelman, which relates to the route that a shipment must travel over between Howes and Superior in order to get this 17½ cent rate that is shown here?

A. The tariff is silent on routing. There is no specific routing provided in this tariff.

Q. Now, the contention of the railway company is that that 17½ cent rate from Howes to Superior applies only over the direct route, and that would be via what junctions on that map, defendant's exhibit 3?

Mr. Putnam: We object to that testimony as calling for a conclusion of the witness and attempting to interpret the tariff by an expression of his own ideas. The interpretation of the tariff is, as we interpret it, from the tariff, from the writing, and the duty originally is on the Interstate Commerce Commission to interpret that tariff, which has been done in this instance; and the opinions or ideas of the management of the railroad company that files the tariff is not proper testimony in a case of this kind.

The Court: Well, did I understand you, Mr. Hagman, to ask what was the shortest route, as to which junctions they should have gone through?

Mr. Hagman: Yes, that is all I intended to ask.

Mr. Putnam: The question as framed called for a much broader answer.

The Court: Well, the question as I understood it was, through which junctions the shortest route ran.

Mr. Putnam: No objection then to that question.

A. The shortest route over the Great Northern Railway Company's rails from Howes, North Dakota, to Superior, is through the junctions shown on the map, defendant's exhibit 3; the junctions of Vance, Fargo, Sauk Center, St. Cloud, Milaca to Superior.

Q. You have examined this table on page 531 of the Interstate Commerce Commission's report which has been introduced in evidence here, have you not?

A. I have.

[fol. 26] Q. And the figures of mileage and percentage of circuity shown on that table are correct, are they not?

A. Yes.

Q. And as to Howes, North Dakota, that shows that the distance over this direct route that you have just specified is 331.3 miles, and via Minneapolis is 406 miles, the route through Minneapolis being 75.7 miles greater, or 23 per cent greater than the direct route?

A. Yes, that is shown on that page and the figures are correct, in accordance with our distance tables.

Q. And the reason that you did not protect the 17½ cent rate from Howes to Superior——

Mr. Putnam: Just a moment. You are putting the answer right in the witness' mouth.

Mr. Hagman: Well, I did not intend to lead on anything that I thought was material. I just thought I would ask him what the reason was that he did not protect that rate through Minneapolis, because of the contention that it only applies over the direct route. I was just trying to save time.

The Court: Well, I think you probably should ask him why they did not protect that rate.

Mr. Hagman: Will you answer that, Mr. Beidleman?

A. I did not protect the rate of 17½ cents from Howes to Superior because under our practice for years——

Q. Well, don't go into your practice. Just state your conclusion as to why they did not protect it, stating the company's position in the matter.

A. We did not protect it because we were of the opinion that the 17½ cent rate published in this tariff from Howes to Superior did not apply on cars which moved through Minneapolis.

Mr. Putnam: We move to strike that answer out as being a conclusion and trying to get into the record the custom of the defendant here, which is not proper evidence on the interpretation of this tariff.

The Court: Well, I think I will let it stand subject to your objection, but I do think that expert testimony is admissible on a question of rates and tariffs. If a tariff is perfectly clear, you are correct in your theory, but if it is not——

Mr. Putnam: Well, our contention is that this tariff is clear.

[fol. 27] The Court: Well, I think I will take the testimony subject to the objection.

Mr. Putnam: May it be considered that the same objection goes to all this testimony, as to all opinion evidence advanced?

The Court: Yes, it may go to all opinion evidence advanced by this witness.

Mr. Hagman: Well, I did not intend to introduce any opinion evidence by this witness. I wanted to stick to the facts that are uncontroversial, so far as possible.

The Court: Well, I am not sure that you have not, as a matter of fact. He has simply given the reasons why they did not protect the rate from the original point to Superior.

Mr. Hagman: Well, his answer was not directly responsive to the question. If we open up the other question here, we can both bring in a lot of witnesses, and it would not add much to their opinion, so, so far as the record is concerned, the witness' statement as to what his opinion is as to how the tariff should be interpreted, may be stricken out.

The Court: Very well.

Q. Let me ask you this—isn't the reason that the Great Northern refused to apply the 17½ cent rate from Howes to Superior in the case of the plaintiff's shipments, because those shipments moved via Minneapolis, and not over the direct route that you indicated a while ago?

A. That is correct.

Q. Now, were there two shipments of the plaintiff's where the direct route was through Minneapolis?

A. Yes—two shipments. One, the originating point was at the station of Rogers, Minnesota; the other originated at the station of Litchfield, Minnesota.

Mr. Hagman: Now, as to those two shipments, in our answer, Your Honor, we admitted that the rate to Superior should be protected, because the direct route was through Minneapolis, and we offered judgment for that amount, and we renew the offer here. The exact amount sued for on the Litchfield and Rogers shipments is shown in exhibit A attached to the complaint of the plaintiff in this Court.

Q. Are shipments of grain which originate on the Great Northern at points west of Willmar and St. Cloud, moved through Minneapolis when they are billed simply to Superior?

[fol. 28] A. They are not.

Q. Have they been in the past at any time to your knowledge?

A. It is the practice to handle shipments originating in territory west of Willmar or St. Cloud, billed to Superior, direct to Superior through those junctions, and not to bring them through the terminals at Minneapolis.

Q. That is the present practice?

A. Yes.

Q. And has it been in the past, as long as you know?

A. As long as I have been in touch with the movement of wheat on the railroad, that has been the practice.

(Defendant's exhibit 5 marked for identification by the reporter.)

Mr. Hagman: I now offer in evidence defendant's exhibit 3.

The Court: It may be received.

Q. I show you a paper marked for identification as defendant's exhibit 5. Will you please state what that is?

A. Defendant's exhibit 5 is a verbatim copy of rule 2-A as published in Great Northern tariff number 1240-C, I. C. C. number A-5348.

Mr. Hagman: Mr. Putnam, you raise no objection because the original tariff is not here, do you?

Mr. Putnam: Not because the original tariff is not here, no.

Mr. Hagman: I would like to state to the Court the purpose of introducing this. You will notice that the last paragraph by specific language provides for the rate not applying over an indirect route, and the argument I expect to make is that when we intend the rate to apply over a circuitous route, we specifically so provide.

The Court: Yes.

Mr. Hagman: I offer in evidence defendant's exhibit 5.

Mr. Putnam: May it please the Court—I object to that being offered, and perhaps, as to my basis for objection, I might ask the witness a question.

The Court: Yes, very well.

Cross-examination.

By Mr. Putnam:

Q. In the tariff from which this exhibit 5 is taken, Mr. Beidelman, is there not an exception, which states that it [fol. 29] does not apply to grain, seed, hay or straw moving over the route?

A. There is an exception on page 2 of tariff Great Northern 1240-C——

Mr. Hagman: Is that exhibit 3 in this case?

Mr. Putnam: No, this is the original tariff.

Mr. Hagman: From which this exhibit was taken?
Mr. Putnam: Yes.

A. (continued). —which states that the conversion and reconsignment rules as named in this tariff do not apply on grain, seed (field), seed (grass), hay or straw unless held on track for inspection or disposition orders incident thereto, at billed destination, or at a point intermediate thereto (see rule 14); and rule 14 of this tariff publishes rules and charges governing grain, seed, hay or straw, carloads, held in cars on track for inspection and disposition orders incident thereto, at billed destination or at points intermediate thereto, and provides certain practice or rules at points where there is inspection of grain required under the provision shown in note 1 of the rule, which states that it applies on grain and seeds held for inspection which is made under federal, state or board of trade requirements, by competent and official authority independent of both vendor and vendee. In other words, rule 14 of this exception, which throws it over on grain and seed, which refers to rule 14—the exception is in connection with cars which are held for inspection under federal, board of trade, or other requirements. The tariff does apply on the reconsigning or forwarding of grain at country points where there is no inspection.

Q. Will you show us where that is in this tariff, where it appears?

A. Well, rule 14 is the rule in connection with federal or state inspection.

Q. But this rule 2-A which you put in here, does not apply to grain movements?

A. It applies to grain originating west of Minot, as the rule provides—for instance, this note here—grain originating West of Minot.

Q. But it does not apply to anything in this territory?

A. In the affected territory, no. These shipments originated East of that territory.

Q. That is what I wanted to get at.

A. Yes.

[fol. 30] Mr. Putnam: The rule that they are putting in here under exhibit 5, at the time it was in force, had no application to the tariffs under which the shipments herein involved moved. Therefore, it is not pertinent or material

evidence effecting the issues in this case, and we object to it.

The Court: Well, I think I will receive it subject to your objection.

Direct examination (continued).

By Mr. Hagman:

Q. Does that rule, from which exhibit 5 is an excerpt, apply to various different rates on different commodities, Mr. Beidleman?

A. Yes.

Q. As well as grain?

A. Yes. It applies to lumber and coal, except coal at lake ports and miscellaneous commodities.

Q. I desire to call your attention to one finding of the Interstate Commerce Commission in its report on page 532, reading as follows: "In the tariff naming rates to Duluth, rates to points between Minneapolis and Duluth, direct and intermediate to Duluth, are higher than to Minneapolis and Duluth. Under complainant's interpretation there would be a violation of the long and short haul clause of the 4th section of the Interstate Commerce Act." In your opinion, that is a correct statement, that the interpretation of the plaintiff results in the tariff creating violations of the long and short haul clause? I will not ask for you- opinion as to the matter, but is that a correct statement, that applying the tariff as contended for by the plaintiff, that is, through the indirect route via Minneapolis, the tariff calls for a higher rate for a longer than for a shorter haul over the same rails.

Mr. Putnam: We object to that as incompetent, irrelevant and immaterial.

The Witness: You made a misstatement there.

Mr. Putnam: Also that it calls for a conclusion of the witness on matters not in this record; that it is an opinion interpretation of the tariff, which it is the primary duty of the Interstate Commerce Commission to interpret, and which they did not see fit to interpret in the order in the case before them.

Mr. Hagman: I might state, Your Honor, that what I desire to do now is merely to support some evidence, or to [fol. 31] introduce some evidence to support and explain

this finding of the Commission, that complainant's interpretation would result in fourth section violations. The finding of the Commission is here. I find no fault with it. I think it is correct, but I thought Your Honor might like to have us take five minutes or so to indicate just how it comes about, and why it is true, and this was merely a question leading up to that.

Mr. Putnam: Well, if it please the Court, Mr. Hagman—the Commission's recital is a recital of the contention of the defendants in this case. They do not say that it is a finding of a fact.

Mr. Hagman: Well, you will not deny that the Commission's ruling in this case was that the complainant's interpretation of this tariff results in there being violations of the fourth section of that Interstate Commerce Act, would you?

Mr. Putnam: I have not checked that specifically, and I do not think it is material to the issues in this case, because there are decisions on that very question.

The Court: Well, I think I will receive the testimony subject to your objection and then you can argue that, as to whether it is applicable or not.

Mr. Hagman: My reason for presenting it, is in connection with the argument to be made later, whether the tariff can be construed in a legal manner so as to be lawful. That is my purpose in elaborating on the Commission's finding here.

The Court: Very well—he may answer.

Mr. Putnam: Exception.

The Court: Well, there is no need to take exception where evidence is taken subject to objection, although you may have one.

Q. (continued). When I asked the question, Mr. Beidelman, I misspoke by saying "a higher charge for a longer than a shorter haul." I intended to say, a higher charge for a shorter than a longer haul. Now, Mr. Beidelman, I wish you would take this tariff which has been introduced in evidence as defendant's exhibit 4, and briefly indicate an example from some point, where a greater charge would be made for a shorter than a longer haul.

[fol. 32] Mr. Putnam: Are all of these examples going to be taken from this tariff?

Mr. Hagman: From this tariff which is in evidence.

Mr. Putnam: Why can't we submit this in a brief? Why put this all into the evidence?

Mr. Hagman: Well, I thought the Court would like to have a few minutes devoted to it. It will not take more than five minutes.

(Question read by the reporter.)

Q. (continued). If the rates from the country points to Superior are made to apply via Minneapolis instead of over the direct route. Just indicate how you find the rate and what it is.

A. Taking the same point, Howes, North Dakota, as the point of origin that I have outlined here, you look on page 43 to find the rate from Howes to Minneapolis or Superior, and you will find no specific rate authorized on that page from Howes to points intermediate between Minneapolis and Superior or, in fact; to any country stations or outside stations which are not grouped in the tariff with Minneapolis or Superior. Your next move, in looking up a rate, would be to look up your point of destination. In this case say it is Cambridge, Minnesota, which is a point intermediate between Minneapolis and Superior, and on page 4 you find the station of Cambridge indexed as number 9. By reference to page 31 of the tariff, there opposite Cambridge you find rates between Cambridge and Minneapolis and between Cambridge and Duluth and Superior, there being no specific provision for rates between Cambridge and points other than Minneapolis, St. Paul, Minnesota Transfer, or between Cambridge and Duluth and Superior; but as mentioned before, under the heading on page 43, and also under the heading at the top of page 31, you find in parenthesis the words "see notes 1 to 16, pages 13 to 17," so the next move would be to go to those notes and see if there is a rate authorized between Howes, North Dakota, and this station I have selected, Cambridge, in any of those notes. On page 14 you strike or find a note which will fix the rate for you. In note number 6 under the heading "between" are listed certain stations, the stations indicated between numbers 5 to 14 inclusive, and Cambridge being indicated as number 9. That is one point. In this column, under the heading "and" you find index number 487 where Howes, North Dakota, is included. Therefore, through the medium of this

[fol. 33] note 6 on page 14 you find a rate between Howes and Cambridge, that rate or the explanation of it being shown in the next column, which, to summarize it briefly, states that on wheat the rate from Howes, or between Howes and Cambridge, is made by adding 4½ cents to the rate published from Howes to St. Paul, unless a lower rate is arrived at by the use of the distance rates published in Section 3 of the tariff.

Q. And those distance rates do not make a lower rate?

A. I have checked it, and they do not make a lower rate than the rate between Howes and Cambridge which is arrived at by adding 4½ cents to the published rate of 17½ cents from Howes to Minneapolis, which would make a rate of 22 cents from Howes to Cambridge.

Q. Then as I understand you, that tariff provides for a rate from Howes to Cambridge, made up of the 17½ cent rate from Howes to Minneapolis, plus 4½ cents, or 22½ cents?

A. 22 cents.

Q. 22 cents. Now, a shipment from Howes to Superior via Minneapolis would move over the same rails as far as Cambridge, as the Cambridge shipment from Howes would, would it not?

A. It would go over the same rails and would pass through Cambridge in getting to Superior.

Q. So in this case, is that one where a greater charge is made for a shorter haul to Cambridge, than for the longer haul to Superior?

A. Yes.

Q. Under the rates contended for by the plaintiff, the rate to Superior, or from Howes to Superior, would be 17½ cents, and your tariff has provided a rate of 22 cents to the intermediate point of Cambridge?

A. Yes.

Q. And that is not the only one in the tariff, is it, where an intermediate point has a higher rate?

A. No.

Q. You gave them merely as an illustration?

A. Yes, that is all—just as an illustration. There would be numerous others. There would be violations of the long and short haul in connection with the Act, in connection I think, all of these shipments.

(Defendant's exhibit 6 marked for identification by the reporter.)

[fol. 34] Q. I show you a paper which has been marked for identification as defendant's exhibit 6, and ask you what that is.

A. That is a copy of the provision contained in supplement 12 to Great Northern GFO tariff number 1250-D, ICC, A-5712, which became effective September 23rd, 1923—copied from the tariff.

Mr. Hagman: There is no objection to this on the ground that the original tariff is not produced or introduced, is there Mr. Putnam?

Mr. Putnam: Well, this was just before the change in the rules on routings I take it?

Mr. Hagman: Yes.

Mr. Putnam: No objection.

The Court: Received.

Mr. Hagman: Of course, this rule speaks for itself, but for the purpose of asking the witness a question, I would like to say——

Q. This rule contained in this exhibit 6, which was taken from the tariffs, indicates that on September 23, 1923, the Great Northern Railway Company amended its tariff, so as to say in so many words, that the rates from these country stations to Superior apply only over the direct route. Is that right?

A. That is correct.

Q. That was the effect of this exhibit 6, as the language itself says?

A. It had that effect. It went much further than that. It said that the shipments made under the rates named in that tariff——

Q. That the rates apply only over the direct route—that is what I am asking?

A. Yes.

Q. Do the rules of the Interstate Commerce Commission provide that when you put in an amendment of a tariff, that you shall indicate whether it has the result of raising or reducing a rate, or making no change in it at all?

A. That is correct. When you change a rate, rule or regulation, you must indicate whether it is an advance, a reduction or no change.

Q. Now, what is the customary method of the Great Northern Railway Company in indicating the effect of a change in tariffs—what signs are used?

[fol. 35] A. Prior to the recent effective date of what we call Interstate Commerce Commission circular number 20-A we designated an advance by a small letter A, printed inside of a square; a reduction by a small letter R in a square; any changes other than advances or reductions by an asterisk and with a reference at the bottom of the page, showing that it made a change other than an advance or reduction.

Q. And in exhibit 6, when that change was made, do you show an asterisk?

A. Yes, and the explanation "change other than advance or reduction".

The Court: Well, was this change in the tariff made after these shipments moved?

Mr. Hagman: After these shipments moved, yes.

Q. Now, I would like to have you state what the purpose of the Great Northern Railway Company was in amending its tariff to provide that these rates would apply only over the direct route, when it had been contending and is now that the rates applied over the direct route, although no routing is shown in the tariff.

A. The purpose was to prevent controversies with shippers and others, such as this.

Q. Such controversies as we have here?

A. Yes, such controversies as we have here.

Mr. Hagman: I guess I must have left a map at the office which I intended to offer. I will substitute for it a statement, showing mileage and so on, which will be marked as defendant's exhibit 7.

(Defendant's exhibit 7 marked for identification by the reporter.)

Q. I show you a paper marked for identification as defendant's exhibit 7, and you may state what that is.

A. This is a statement showing the mileage from certain points of origin in Minnesota and North Dakota, direct to Superior, Wisconsin; also to Superior, Wisconsin, from the same points of origin, via Minneapolis; and the circuity

of the hauls through Minneapolis, expressed in miles and in per cents.

Q. Now, the Delmar Company, the plaintiff in this case, did not make any shipments to Superior from these points of origin shown in exhibit 7, did they?

A. They did not.

[fol. 36] Q. But the International Grain Company, which had a case before the Interstate Commerce Commission and which is decided jointly with the Delmar case, had shipments to Superior from these origin points shown in exhibit 7, did they not?

A. From some, if not all of them. They had shipments from some of these points. I am not positive that they had them from every one of these points.

Q. Well, between the various parties named in the footnote on page 530 of the Interstate Commerce Commission's report in the Delmar case, between the various parties named there, did they have shipments of grain from these origin points to Superior, over the Great Northern Railway?

A. Yes, there were shipments of grain from all of these origin points, through Minneapolis to Superior, which were involved in proceedings of the same nature, asking for the protection of the direct rate.

Q. In any event, the Great Northern has had direct shipments from these points to Superior?

A. Actual shipments involving the same things which are here in controversy.

Mr. Hagman: We offer in evidence defendant's exhibit 7. While these points are not shipping points by the Delmar Company, they are original grain shipping points involved in the other cases before the Commission, and it is my position that the Delmar case is a test case. There are a number of others, where there are large amounts involved, and in the Delmar case, as that map shows, the points of origin are pretty far south, so that the circuity in going through Minneapolis is not so pronounced as it would be if the shipments came from North Dakota or northern Minnesota points. I offer this exhibit in evidence as showing that the addition and circuity in going through Minneapolis would be very much greater than via the direct route, and in those

cases the circuity would be much greater than is the case in regard to the shipments involved in this proceeding. The purpose of it will be discussed in the argument later, to indicate the effect of the Commissioner's decision in this case as to all shipments generally, and not just to the plaintiff's in this case.

Mr. Putnam: Objected to as incompetent, irrelevant and immaterial, not material to any matter in issue in this proceeding.

The Court: It may be received subject to the objection.

[fol. 37] Q. Now, I desire to call your attention, and also Your Honor's, to this map, which has been marked as defendant's exhibit 3.

Mr. Hagman: Your Honor will observe Surrey, North Dakota, on that map, where the main line forks.

The Court: Yes.

Mr. Hagman: And just East of there, the station of Granville, and also East of Surrey on the other line, the station of Genoa.

The Court: Yes.

Q. (continued). Mr. Beidelman, will you please state what the distance is between Granville and Genoa, by the way of Surrey?

A. Twenty-one miles.

Q. Will you please also state what the distance is from Granville to Genoa by the way of Duluth and Minneapolis, or by the way of Boyleston, Minnesota, and Minneapolis?

A. Approximately 1100 miles.

Q. And it is possible to move a shipment over that 1100 miles of route between Genoa and Granville, just as much as it is possible to move it 21 miles via Surrey, is it not?

A. You could haul it around there, and you would not be rehauling it back over the same rails. It would be a direct forward movement all the time.

Mr. Hagman: I put these figures of distance in the record because there is a dissenting opinion in this case by Mr. Taylor, one of the Interstate Commerce Commissioners, who dissents to the finding of the majority that the through rates from the points of origin in question to Duluth and Superior, without the additional charge beyond Minneapolis, were applicable on the shipments moving through

Minneapolis over the Great Northern, and that if that rule is applicable, the shipper could dictate to them which way it should go. It is an extreme example, but we are introducing it as an explanation as to his holding. I might say that there are other findings of facts in the report and order of the Commission, or in the report which we have not attempted to elaborate on, but of course, we rely on them just the same. That is all.

The Court: Yes.

[fol. 38] Cross-examination.

By Mr. Putnam:

Q. Mr. Beidelman, in your exhibit 6, which is the exhibit which shows the change in the application of routes over which the rates were applicable—that change was made at a time when a controversy had been instigated or stated between shippers and your claim department, was it not, a question had arisen?

A. This specific provision was placed in the tariff as I previously stated, to avoid controversy.

Q. But controversies had started at that time, had they not?

A. Oh, yes. My previous answer covered that.

Q. The shippers were claiming the benefit of the rate via Minneapolis, and this was put in so that in the future they could not make that claim?

A. It was put in, in an effort to clarify the tariff. They had started such contentions after 20 or 30 years—

Q. Now, if you at that time had placed in the tariff, instead of a symbol which indicated no change in the rate, a symbol that would have indicated an advance in rate, you might have prejudiced your position in proceedings such as this might you not?

Mr. Hagman: That is objected to as asking a witness for a conclusion and not for a fact.

The Court: Well, I will take the testimony subject to the objection. He may answer.

A. We would not think of putting that in there, because we undertake to put in what we consider to be the changes which are made. If it is an advance, we call it an advance;

if it is no change, we designate it as no change—to the best of our knowledge.

Q. Similar rates or rates for similar movements in connection with other carriers are published in tariffs known as the Countiss tariffs, are they not?

A. Yes, we were a party to Countiss' tariffs at that time, which are now designated as Toll's tariffs.

Q. At approximately the same time, a similar provision was placed in the Countiss tariffs, governing movements that would operate under the Countiss tariffs, but which would include transportation either to Minneapolis or Superior by one of these routes?

A. Yes.

Mr. Hagman: Do you mean, over the Great Northern alone, or in connection with other railroads?

[fol. 39] Mr. Putnam: In connection with other railroads, but from the point of Wilmar to Minneapolis, or Willmar to Superior?

A. Well——

Q. Well, state whether that tariff covered that operation?

A. That and other tariffs. We had a similar rule placed in other tariffs.

Q. When that was put in the Countiss tariff, do you recall whether that was indicated as no change or as an advance?

A. I do recall it very clearly.

Q. What did it indicate?

A. It indicated as I recall it, an advance, and we immediately took it up with Mr. Countiss, to know why some clerk in his office had done that.

Q. So it was put in that tariff as an advance?

A. Yes.

Q. While in your tariff it was put in as no change?

A. The publishing agent, Mr. Countiss, put it in as an advance, and we took it up immediately with him, to have it straightened out.

Mr. Putnam: I ask that the last be stricken.

The Court: Yes, it may be stricken.

Q. Mr. Beidelman, referring to defendant's exhibit 3, this map, and taking a shipment which originated at Howes,

North Dakota, Howes being located on the line of the Great Northern, the north and south line, which is west of Fargo——

A. Yes.

Q. The general movement of traffic would be from Howes south, wouldn't it, and would go to Willmar, and from there across through St. Cloud to Superior?

A. It would go south, and either through Willmar or St. Cloud—one or the other of those points.

Q. But the general movement of that traffic would be through Willmar?

A. In practice, our line through Willmar is the one over which we handle most of our freight.

Q. So that if the movement of these cars that are under consideration here, if they were originally routed to Superior, they would not of necessity take the short route; they would take the usual line of operation through Willmar?

A. Well, I can't say which route they would take. They would take one or the other.

Q. But in the majority of cases, isn't that right?

A. I can't say as to that.

Q. That is your general line of traffic, isn't it?

[fol. 40] A. Our transcontinental traffic is handled through Willmar. The miscellaneous traffic is handled through Willmar and the St. Cloud division in accordance with the way the power is working. By that, I mean the engines. It isn't an ironclad rule—either one route or the other route.

Q. Either line is available for the movement then?

A. Yes, and it is handled over both lines.

Q. And your transcontinental traffic is handled largely over the Willmar route?

A. Coming into eastern terminals, yes. That is the preferred route.

Q. So you do not necessarily then handle that by the short route?

A. In every instance we do not.

Q. There are other available routes which may be used to Superior, are there not?

A. Yes, sometimes it is handled in fact through Larimore, and across that way. It may be.

Q. Or it may move over the northern rails?

A. That is, th-ough Larimore, yes.

Q. Shipments originating at the points indicated here in red that are in South Dakota, would either go through Willmar to Superior or through Tintah and Evansville to Superior, would they?

A. One or the other of those routes. After leaving Willmar they would go through St. Cloud—not through Minneapolis.

Q. Is there any movement of traffic from Tintah to Evansville, of any consequence?

A. No.

Q. So that freight originating at points like Park, Tacoma, Putney, and Burch, would go to Willmar before going to Superior?

A. They would move through Willmar and St. Cloud.

Mr. Hagman: You might ask why there—I think it might save some redirect examination.

Q. I presume that is your regular line of operation, isn't it?

A. As to why they are handled that way?

Q. Yes.

A. Because the Tintah-Evansville cutoff is not a railroad over which you could handle heavy tonnage, but mileages are figured across that way. I might add to that—it is not a physical railroad—the rails and bridges are light.

Q. In speaking of these shipments at Minneapolis being sent to Superior, you speak of reconsignment or reship- [fol. 41] ment. You mean reconsignment, do you not? They were all reconsigned.

A. They were reshipped to both. There were no cars billed from Minneapolis. Taking one as an example; when a shipper came to the railroad company and surrendered his freight bills showing that the grain had moved into Minneapolis; under the provisions of item 170 on page 55 of the tariff, defendant's exhibit 4, a shipment of wheat would be entitled to the proportional rate of 6½ cents from Minneapolis to Duluth.

Q. Now, Mr. Beidelman, was the freight bill surrendered at Minneapolis, under that provision? Have you an actual knowledge of that?

A. As to whether the freight bill was actually surrendered, I can't say of my own knowledge and belief, but

from the fact that it was the identical car which brought the shipment from the country station to Minneapolis, it follows that it had moved into Minneapolis.

Q. It had moved into Minneapolis?

A. Because our agent had a record of it having moved in from the country station.

Q. And then it was moved into Superior or Duluth——

A. Under item 170 of this exhibit 4. No reconsigning charge was charged on any of this grain.

Mr. Hagman: Well, I don't think there is any difference between us, so far as this case is concerned, which involves the question of whether these shipments were reconsigned or reforwarded, because we charged you the proportional rate from Minneapolis to Superior, which was 6½ cents. We did not charge you with the local rate of 13 cents; so what the proper rate was between Minneapolis and Superior, as I state, would not enter into the question of whether the rate from Howes to Superior applied via Minneapolis or not.

Mr. Putnam: Well, I think on the question there of whether it was a reshipment or not—he used the word reshipment.

Mr. Hagman: How would it have any bearing on the issues here?

Mr. Putnam: Under the tariff, a reshipment might be interpreted otherwise, and if it is conceded that it was merely a reconsignment, I do not raise any question about it. I don't like the term "reshipment". I don't want to put a witness on the stand to straighten that out.

[fol. 42] Mr. Hagman: Well, the Commission on page 532 of this report, after citing this section I have referred to says: "It is manifest from the wording of the above rule that it is intended to apply to reshipments only and not as here to reconsignments," so the Commission considered these reconsignment, so I don't see what difference it makes what they were, so far as the issues here are concerned.

Q. I believe you testified that there was no specific restrictions in the tariff, as to the route that these shipments should take.

A. The tariff was silent on that entirely.

Q. The examples that you have used here are the rates from Howes, North Dakota?

A. Yes.

Q. Is there any other point in this list, from which the rates to Minneapolis and Superior are exactly the same, according to the tariff?

A. Not except Howes. I so testified.

Q. In the other instances the rate to Minneapolis is lower than the rate to Superior, and so the difference would be less in the claims here?

A. Yes, that is correct.

Q. Howes may be an illustration, but is not really typical of this movement as an average condition?

Mr. Hagman: Well, I object to the question because I don't understand what you mean by typical. Do you mean typical in so far as the amount of overcharge on your theory is concerned.

Mr. Putnam: Yes, on the movement.

Mr. Hagman: Well, if that is it, I have no objection.

A. Well, Howes, as I stated, is the one point from which the rate to both Minneapolis and Superior is the same. Therefore, the spread or the difference would be less in the other cases, or on the other cars.

Q. And also the out of line movement would be greater in that case?

A. Well, they are all figured on the table in the Commission's report, on page 531, which is an exhibit in this case.

Q. Mr. Beidelman, from your investigation of these shipments and of other shipments from similar points—maybe not exactly the same—cars have moved to Minneapolis, have been reconsigned to Superior, and you have collected only the through rate—the through rate published from the point of origin to Superior?

[fol. 43] Mr. Hagman: Do you want to open up that question, which took so much time before the Commission, and on which there is a finding here? If you do, all right, but if you do it will be a lengthy proceeding. There is a finding here on page 532.

Mr. Putnam: Which says that these cars have moved in that manner and that you have collected only the published rate from point of origin to destination.

Mr. Hagman: Well, I am not subscribing to your language as to what this says. It is here though. If you open this up, there is a lot to be said about it.

Mr. Putnam: Well, I would like to have an answer to that question.

Mr. Hagman: I have not made any attempt to go into anything with respect to this finding on page 532 as to what the previous practice was. I am relying upon the finding of the Commission here.

The Court: Well, have you any quarrel with the Commission on that, Mr. Putnam, as to what they have said on that matter?

Mr. Putnam: No, I don't think we have any quarrel with that finding but the witness could answer that question without going any further than the Commission has—that there have been such shipments.

Mr. Hagman: Well, I feel that we should object to it, on the ground as stated.

The Court: Well, I think the Court would have to accept the determination of the Commission on that, and inasmuch as it has not been gone into here, unless it is important, I do not see why we should go into it.

Mr. Putnam: Under those conditions I will withdraw the question. That is all.

Redirect examination.

By Mr. Hagman:

Q. Counsel for plaintiff called your attention to this exhibit 6, and in that connection asked you if in the tariff published by Mr. Countiss, to which the Great Northern is a party, a similar provision respecting routing was not shown as an advance. I think you explained that.

A. I stated that it was.

[fol. 44] Q. Now, Mr. Countiss, who is now succeeded by Mr. Toll, while he had charge, was the agent for a large number of railroads for the purpose of publishing their tariffs, was he not?

A. Yes, he published tariffs, and there were other duties, but that was one of his duties as agent.

Q. And the purpose of it was to avoid each line publishing individual tariffs?

A. Yes.

Q. And this tariff that Mr. Putnam referred to as having been issued by Mr. Countiss, differed from the Great Northern Railway Company's tariff named in your exhibit 6, in that the Great Northern tariff referred to in exhibit 6 was an exclusively Great Northern tariff published by the Great Northern Railroad Company, on its own behalf?

A. That is correct.

Q. And that Countiss tariff was a tariff which he published as agent for a large number of lines?

A. Yes, that is correct.

Q. You were asked some questions with respect to the routes over which shipments were actually carried, and I think counsel for plaintiff brought out that in some instances there was some variation from the absolutely shortest route. I think you said that, didn't you?

A. In actual operations there is some variation.

Q. But you did say that that variation never extended to the extent of going through Minneapolis in getting to Superior?

A. No, because I had already testified as to the movement of grain from points west of St. Cloud and Willmar to Superior, always going through Willmar and St. Cloud, and never through Minneapolis.

Q. Explain a little more fully why it is that in some instances the Great Northern Railroad does not move a shipment over the absolute shortest route, but makes some slight deviation from the shortest route in miles.

A. One principal reason is to accommodate the train service. If I may amplify that a little, you may have ample power at one end of a freight run, going say south, and your trains moving north-bound may be heavy, so in cases of that kind, they would pick up on the south-bound move, loads which naturally under direct mileage would be north-bound——

Mr. Putnam:: Well, just a moment.

Mr. Hagman: You brought this up yourself. I am having the witness explain why there is that slight deviation from the direct route at times. I would not have gone into this if you had not opened it up.

[fol. 45] The Court: Well, isn't that rather obvious, that that would be true; that they would move the traffic in the

most economical way, depending upon power and equipment?

Mr. Hagman: Yes, I think so. I wanted to bring it out that it was a matter of economy and convenience——

The Court: I think I understand that.

Mr. Hagman: Then that is all. We rest our case.

Mr. Putnam: Plaintiff rests also.

DEFENDANT'S MOTION FOR FINDINGS AND JUDGMENT

Mr. Hagman thereupon moved the Court on behalf of the defendant for findings and judgment in favor of the defendant upon the sole and only ground that the evidence would support no other conclusion, with the understanding that if said motion was denied the defendant would be allowed exceptions to the same.

STIPULATION OF COUNSEL APPROVING BILL OF EXCEPTIONS

It is hereby stipulated that the foregoing, consisting of 48 pages of typewritten matter, together with plaintiff's exhibits A and B and defendant's exhibits numbered 1, 2, 3, 4, 5, 6 and 7, which exhibits were offered and received in evidence, constitute a full, true and correct transcript of all of the testimony duly offered and introduced, and of all motions, rulings and orders made, and of all exceptions taken and allowed upon the trial of the foregoing action, and that the same is in accordance with the truth and may, without further notice, be settled, allowed and certified as the Bill of Exceptions in said action and made a part of the record herein.

Dated this 20th day of December, 1929.

Shaw, Safford, Putnam and Shaw, Attorneys for Plaintiff, 826 First National-Soo Line Bldg., Minneapolis, Minnesota. F. G. Dorety, J. H. Mulally, R. J. Hagman, Attorneys for Defendant, 1120 Great Northern Building, St. Paul, Minnesota.

[fol. 46] APPROVAL OF BILL OF EXCEPTIONS BY DISTRICT JUDGE

Thereupon, and within the time allowed, the defendant duly tendered this Bill of Exceptions herein, which having

been seen and examined by the Court and counsel, and counsel having consented thereto, and it appearing to the Court that the same, together with the exhibits referred to in the attached stipulation of consent, contain all the evidence offered and introduced; and of all motions made, rulings and orders made, and all exceptions taken and allowed upon the trial of the foregoing action, is hereby allowed, approved, signed, sealed and ordered to be filed and made a part of the record in this cause this 27th day of December, 1929.

By the Court:

John B. Sanborn, District Judge.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed Dec. 2, 1929

Now comes the Great Northern Railway Company, the defendant and appellant in the above entitled proceeding, and respectfully assigns the following errors in the record and proceedings in said case:

1. The United States District Court for the District of Minnesota, Fourth Division, erred in denying defendant's motion for findings and judgment in its favor upon the sole and only ground that the evidence would support no other conclusion.

2. The said Court erred in failing to find that as a matter of law, regardless of any finding or holding of the Interstate Commerce Commission with respect thereto, the rates from the country stations to Superior, Wis., published in defendant's tariffs and demanded by plaintiff on its shipments, applied only via the shortest and most direct routes and not via the circuitous route through Minneapolis which plaintiff's shipments took.

3. Said Court erred in construing the finding of the Interstate Commerce Commission that the route through Minneapolis, Minn., to Superior, Wis., was "an open route," as a finding that the route through Minneapolis was not "unduly circuitous"; and the Court further erred in holding that the

[fol. 47] Interstate Commerce Commission did not find that where a rate is published in a tariff without restricting the movement to any particular route, that the shipper may use any route no matter how circuitous.

4. The said Court erred in holding that the Interstate Commerce Commission in finding the route through Minneapolis to Superior to be "an open route" determined a question of fact or an administrative question which the Court in this case should not upset.

5. The said Court erred in failing to find that if the defendant's tariff rates for transportation from the country stations to Superior are applied to the circuitous route through Minneapolis it would result in extending a privilege or facility in the transportation of property which is not specified in the defendant's tariffs and contrary to Section 6 of the Interstate Commerce Act.

6. The Court erred in failing to find that the evident intent of the defendant's tariffs was to restrict the routing in connection with rates from the country stations to Superior to the shortest and most direct route.

7. The said Court erred in failing to find that it was the custom to apply the rates from the country station to Superior named in this tariff to the direct route and to apply the proportional rate on shipments reconsigned at Minneapolis.

8. The said Court erred in failing to find that the application of the defendant's rates from the country stations to Superior via the circuitous route through Minneapolis would result in violations of the long-and-short-haul clause of the fourth section of the Interstate Commerce Act and in placing an unlawful construction upon defendant's tariffs which would be avoided by construing the said rates as applying only over the shortest and most direct route.

9. The said Court erred in failing to find that effect should be given to all parts of the defendant's tariffs.

10. The Court erred in failing and refusing to dismiss the complaint except as to the shipments from Litchfield and Rogers, Minn.

Dated this 26th day of November, 1929.

F. G. Dorety, J. H. Mulally, R. J. Hagman, Counsel for Appellant.

[fol. 48] (Endorsed:) Service admitted this 27th day of Nov. 1929. Shaw, Safford, Putnam & Shaw, Attorneys for plaintiff.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

PRAYER FOR REVERSAL—Filed Dec. 2, 1929

Now comes the Great Northern Railway Company, the defendant in the above entitled proceeding, and respectfully prays that for the errors assigned and filed herewith, the judgment of the United States District Court for the District of Minnesota, Fourth Division, entered herein on the 5th day of September, 1929, in favor of the plaintiff Delmar Company, and against the defendant Great Northern Railway Company, in the sum of Nine Hundred Twenty and 27/100 Dollars ($920.27), be reversed and a judgment rendered in favor of the said Great Northern Railway Company and for its costs.

Dated this 27th day of November, 1929.

F. G. Dorety, J. H. Mulally, R. J. Hagman, Attorneys for Defendant.

(Endorsed:) Service admitted this 27th day of Nov., 1929. Shaw, Safford, Putnam & Shaw, Attorneys for Plaintiff.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL—Filed Dec. 2, 1929

To the Honorable John B. Sanborn, District Judge:

The above named defendant feeling aggrieved by the judgment rendered and entered in the above entitled cause on September 5, 1929, does hereby appeal from said judgment to the United States Circuit Court of Appeals for the Eighth Circuit, for the reasons set forth in the Assignment of Errors filed herewith, and it prays that an appeal be al-

lowed and that citation be issued as provided by law and that a transcript of the record, proceedings and documents upon which said judgment was based, duly authenticated, be sent to the said Circuit Court of Appeals under the rules [fol. 49] of said Court in such case made and provided, and the petitioner further states that plaintiff has waived both cost and supersedeas bond, which waiver is attached hereto, and prays that this appeal be allowed without bond.

F. G. Dorety, J. H. Mulally, R. J. Hagman, Attorneys for Defendant, 1120 Great Northern Building, St. Paul, Minnesota.

Dated: November 27th, 1929.

WAIVER OF COST AND SUPERSEDEAS BOND AND CONSENT TO STAY

Now comes the plaintiff above named, by and through its attorneys of record, and waives both a cost and a supersedeas bond on any appeal taken by the defendant from the judgment entered herein, and consents to the making of an order allowing an appeal by the defendant without either a cost or supersedeas bond, and providing that all proceedings herein be stayed to the same extent as if a supersedeas bond had been filed and approved.

Dated November 27th, 1929.

Shaw, Safford, Putnam and Shaw, Attorneys for Plaintiff, 826 First National Soo Building, Minneapolis, Minnesota.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL—Filed Dec. 2, 1929

Upon motion of Messrs. F. G. Dorety, J. H. Mulally, and R. J. Hagman, attorneys for defendant,

It is hereby ordered that an appeal to the United States Circuit Court of Appeals for the Eighth Circuit from the judgment heretofore filed and entered herein be, and the same hereby is, allowed, and that a certified transcript of [fol. 50] the record, testimony, exhibits, stipulations, and

all proceedings be forthwith transmitted to said Circuit Court of Appeals.

It is further ordered that said appeal is allowed without either a cost or supersedeas bond, and that all proceedings herein be stayed in the same manner and to the same extent as if such bonds had been filed and approved.

By the Court:

John B. Sanborn, Judge.

Dated December 2, 1929.

[File endorsement omitted.]

Citation, in usual form, showing service on Shaw, Safford, Putnam & Shaw, filed December 3, 1929, omitted in printing.

[fol. 51] IN UNITED STATES DISTRICT COURT

ELECTION AS TO PRINTING—Filed Dec. 21, 1929

The defendant in the above entitled cause hereby elects to take and file in the United States Circuit Court of Appeals for the Eighth Circuit a transcript of the record herein, to be printed under the supervision of the Clerk of said Court, under its rules.

F. G. Dorety, J. H. Mulally, R. J. Hagman, Attorneys for Defendant, 1120 Great Northern Building, St. Paul, Minnesota.

Dated December 20, 1929.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR TRANSCRIPT—Filed Dec. 21, 1929

To the clerk of the above-entitled Court:

You will please prepare transcript of the record in this cause to be filed in the office of the Clerk of the United

States Circuit Court of Appeals for the Eighth Circuit under the appeal heretofore taken by the defendant, and include in said transcript the following:

1. Complaint.
2. Answer.
3. Reply.
4. Stipulation waiving jury.
5. Decision.
6. Judgment.
7. Clerk's Record of trial.

[fol. 52] 8. Order extending time to settle Bill of Exceptions to January 1, 1930.

9. Bill of Exceptions with stipulation and order settling same.

10. Assignment of errors and prayers for reversal.
11. Petition for appeal with waiver of bond.
12. Order allowing appeal.
13. Citation on appeal.
14. Election as to printing.
15. This præcipe.
16. The following exhibits, to-wit:

(a) Plaintiff's Exhibit A.
(b) Plaintiff's Exhibit B.
(c) Defendant's Exhibit 1.
(d) Defendant's Exhibit 2.
(e) Defendant's Exhibit 3.
(f) Defendant's Exhibit 4.
(g) Defendant's Exhibit 5.
(h) Defendant's Exhibit 6.
(i) Defendant's Exhibit 7.

17. Clerk's certificate to transcript.

Said transcript to be prepared as required by law and by the rules of the United States Circuit Court of Appeals for the Eighth Circuit.

F. G. Dorety, J. H. Mulally, R. J. Hagman, Attorneys for Defendant, 1120 Great Northern Building, St. Paul, Minnesota.

Dated December 20, 1929.

Consent to Contents of Record

The plaintiff, by and thru its attorneys of record, hereby admits service of the above præcipe and contents

[fol. 53] thereto and agrees that the transcript requested thereby contains all of the records in this case which are material to the determination on the merits of the appeal heretofore taken by defendant.

Shaw, Safford, Putnam & Shaw, Attorneys for Plaintiff, 826 First National Soo Line Bldg., Minneapolis, Minnesota.

Dated December 20, 1929.

[File endorsement omitted.]

PLAINTIFF'S EXHIBIT A, ORDER OF INTERSTATE COMMERCE COMMISSION

AT A GENERAL SESSION OF THE INTERSTATE COMMERCE COMMISSION, HELD AT ITS OFFICE, IN WASHINGTON, D. C., ON THE 10TH DAY OF OCTOBER, 1927

No. 16576

DELMAR COMPANY

vs.

GREAT NORTHERN RAILWAY COMPANY

It appearing, that on January 10, 1927, the commission entered its report in the above entitled proceeding, which report is hereby referred to and made a part hereof, and this proceeding now coming on for further consideration on the question of reparation, and the parties having filed an agreed statement with respect to the shipments in question; we find that complainant is entitled to an award of reparation from above-named defendant in the amount of $648.84, with interest.

It is therefore ordered, that the above named defendant be, and it is hereby authorized and directed to pay unto complainant Delmar Company, on or before November 25, 1927, the sum of $648.84, with interest thereon at the rate of six per cent per annum from September 15, 1922, as reparation on account of inapplicable rates charged for the transportation of numerous carload shipments of grain

from points in North Dakota, South Dakota and Minnesota, to Superior, Wis.

By the commission.

George B. McGinty, Secretary. (Seal.)

[fol. 54] (Endorsed:) Filed Apl. 9, 1929. Joel M. Dickey, Clerk, by Thomas H. Howard, Deputy.

PLAINTIFF'S EXHIBIT B

INTERSTATE COMMERCE COMMISSION

No. 16576

DELMAR COMPANY

vs.

GREAT NORTHERN RAILWAY COMPANY

Submitted March 20, 1926. Decided January 10, 1927

Order of Interstate Commerce Commission

Local rates on grain, in carloads, from points in Montana, North Dakota, South Dakota, and Minnesota to Duluth, Minn., and Superior, Wis., unrestricted as to routing, found applicable through Minneapolis, Minn., as well as over the more direct routes, except where the tariffs provided for an additional charge beyond Minneapolis. Reparation awarded.

J. F. Adams and William J. Harrigan for complainants.

M. L. Countryman, Jr., A. H. Lossow, R. J. Hagman, F. G. Dorety, D. F. Lyons, B. W. Scandrett, and Fletcher Rockwood for defendants.

Report of the Commission

By the COMMISSION:

Exceptions were filed by complainant in No. 16576 and by defendant Great Northern Railway Company to the reports proposed by the examiners and the cases were

orally argued. All the cases will be embraced in one report. Rates will be stated in cents per 100 pounds.

No. 16576

Complainant in No. 16576, a corporation dealing in grain at Minneapolis, Minn., by complaint filed December 4, 1924, alleges that the rates charged on wheat, corn, oats, and rye, in carloads, between May 3 and September 10, 1922, from points in North Dakota, South Dakota, and Minnesota, originally billed to Minneapolis, Minn., and reconsigned to Superior, Wis., were inapplicable. Reparation only is sought. The shipments moved over the Great Northern. Complainant paid the through rates to [fol. 55] Minneapolis, and 6 cents on corn, oats, and rye, and 6.5 cents on wheat, beyond.

The direct route to Superior from the several points of origin, except Litchfield and Rogers, Minn., is via Willmar and St. Cloud, Minn. The route traversed via Minneapolis is longer. The Great Northern offers to refund admitted overcharges on the shipments from Litchfield and Rogers.

The distances from points of origin to Superior, Wis., over the two routes and differences, as shown by an exhibit follows:

This report also covers No. 16466, International Grain Company vs. Northern Pacific Railway Company, et al.; (Sub-No. 1), Hatton Farmers' Elevator Company vs. Great Northern Railway Company; (Sub-No. 2), International Grain Company vs. Great Northern Railway Company; (Sub-No. 3) Same vs. Minneapolis St. Paul & St. Sault Ste. Marie Railway Company, (Sub-No. 4) Same vs. Same; and (Sub-No. 5), Buxton Grain & Potato Company vs. Great Northern Railway Company.

Point of origin	Shortest mileage		Additional haul via Minneapolis	
	Direct via Mpls.		Miles	Per cent
Howes, N. Dak.	331.3	406.0	75.7	23
Rogers, Minn.	167.7	167.7	0.0	0
Litchfield, Minn.	211.1	211.1	0.0	0
Kerkhoven, Minn.	207.3	251.0	43.7	21
Appleton, Minn.	245.7	289.4	43.7	18
Halloway, Minn.	239.6	286.3	43.7	18
Albee, S. D.	275.6	319.3	43.7	16
Burch, S. D.	334.3	409.3	75.0	22
Grover, S. D.	325.6	369.3	43.7	13
Osceola, S. D.	364.5	408.2	43.7	12
Planey, S. D.	366.2	441.2	75.0	20
Putney, S. D.	358.6	433.6	75.0	21
Sheffield, S. D.	376.5	420.2	43.7	12
Rauville, S. D.	309.9	353.6	43.7	14
Tacoma Park, S. D.	362.4	437.4	75.0	21
Willow Lake, S. D.	347.8	391.5	43.7	13

The above description is representative and does not embrace all shipments upon which reparation is asked.

The tariffs of the Great Northern provided through commodity rates from points of origin to Superior and to Min- [fol. 56] neapolis. The through rates were higher to Superior than to Minneapolis, except that from Howes, N. Dak., the rates to both destinations were equal. Complainant admittedly complied with the requirements of the applicable reconsigning rules. It contends that inasmuch as the Great Northern published no tariff rule restricting routing to Superior it was authorized to ship over the long route at the through rate. Defendant contends that the rates charged were applicable.

A specific tariff rule restricting the rate to the short route was established on September 25, 1923, after these shipments moved. When the shipments moved item 170 of the tariff, providing the proportional commodity rates of 6 and 6.5 cents charged, carried the following additional provision:

Applies only as a proportional rate on shipments originating beyond. The local rate from points from which the proportional rate applies to be the minimum through

rate viz 13 cents per 100 lbs. on article in group 1 and 11.5 cents per 100 lbs. on articles in group 2.

Wheat is in group 1 and corn, oats and rye are in group 2.

In naming the rate the tariff refers to notes 1 and 2. Note 1 only is important here. It provides:

Duplicate inbound freight bills of in-tial line bearing following notations must be surrendered to the Great Northern Railway on date of reshipment as authority for protection of rate named:

This duplicate freight bill must be surrendered to obtain proportional rates on Grain, Grain Products, Flaxseed, Millet Seed or Flaxseed Screenings when reshipped. No other freight bill will be accepted for reshipping purposes. Shipments moving under this proportional rate must be forwarded within twelve months (see exception) from date of freight bill covering original shipment. Carriers will require an accounting of tonnage on hand and cancellation of excess freight bills annually, as of either June 30th or December 31st and at such other times as may appear necessary to properly apply the lawful rates.

It is manifest from the wording of the above rule that it is intended to apply to reshipments only and not as here to reconsignments.

[fol. 57] Complainant's witness testified that 20 of its shipments were reconsigned and moved through Minneapolis to Superior at the through rate. Whether cars of other shippers moved in like manner under the same rate is not shown. A witness for the Great Northern testified that the 20 cars referred to were permitted to move over the long route at the through rate by error and oversight. It appears that previously it was the custom to apply the through rate only via the direct route, and to apply the proportional rate on shipments reconsigned at Minneapolis. Certain traffic difficulties and delays are encountered in moving traffic through the Minneapolis terminals that are not encountered over the short route. In the tariff naming rates to Duluth, rates to points between Minneapolis and Duluth, directly intermediate to Duluth, are higher than to Minneapolis and Duluth. Under complainant's interpretation there would be a violation of the

long-and-short-haul clause of the fourth section of the interstate commerce act.

In Pioneer Lumber Co. vs. Director General, 74 I. C. C. 288, respecting shipments from Puget Sound via Minneapolis to Superior, about 2,042 miles, we said:

At the time of movement the rates to Minnesota Transfer also applied to Duluth via the "Northern Pacific Railway," but defendants argue that they applied only by way of the direct route through Staples and Brainerd, Minn., and not over the route of movement, which is 146 miles longer. There was nothing in the governing tariffs which restricted the application of the rates to a particular line of the Northern Pacific. The route through Minnesota Transfer is workable and in the past the Northern Pacific tariffs have specifically provided for the application of the Duluth rates through that point. In the absence of a restricted routing, it must be held that the rates to Duluth applied over the route of movement. Van Dusen Harrington Co. vs. C. M. & St. P. Ry. Co., 47 I. C. C. 59, 61.

The route from points of origin herein through Minneapolis to Superior was an open route and in the absence of restricted routing it must be found that the through rates to Duluth applied over the route traversed.

No. 16466 and Sub-Nos. 1 to 5

From the points of origin here considered in Minnesota, North Dakota, and Montana the Northern Pacific, the Great Northern, and the Minneapolis, St. Paul & Sault Ste. Marie Railways, the latter hereinafter called the Soo [fol. 58] Line, each reaches Duluth, Minn., or Superior, Wis., or both, by a route through Minneapolis, Minn., which is longer than its direct route. The tariff of each of these carriers naming rates on wheat to Duluth and Superior contains no routing restrictions. Each carrier publishes, from certain of these origin points, the same rate to Minneapolis as to Duluth and Superior. These complainants billed carload shipments of wheat to Minneapolis, surrendered inbound billing, meeting all tariff requirements in that respect, and reforwarded the cars to Duluth or Superior. They were charged the rate to Minneapolis, plus 6.5 cents beyond. The latter is the equiva-

lent of the proportional rate from Minneapolis to Duluth and Superior. Complainants allege that, inasmuch as the tariffs of the respective lines provided no routing, and placed no restrictions upon routing, the rate to Duluth and Superior was applicable through Minneapolis, and that the charging of an additional 6.5 cents beyond Minneapolis was unlawful under section 6 of the interstate commerce act. The reasonableness and propriety under other sections of the act of the rates charged is not in issue.

The one shipment over the Northern Pacific was from Ronan, Mont., to Duluth. The direct route of the Northern Pacific between these points is through Brainerd, Minn., 1,315 miles, 146 miles less than the route through Minneapolis, 1,461 miles. The rate was 48 cents to Duluth and Minneapolis, and the tariff, as stated, specified no routing, or restriction of routing. Rule 33 thereof provided, as shown below, for the addition of 6.5 cents to the rate to Minneapolis, on shipments routed through Minneapolis, from all except certain designated points, as to which it specifically provided for no additional charge.

33. Grain Reforwarded.—Grain originating at stations named herein may be reforwarded in the original car and on the original waybill at St. Paul, Minneapolis or Minnesota Transfer to Duluth, Minn., or Superior, Wis., or reforwarded to Duluth, Minn., or Superior, Wis., to St. Paul, Minneapolis or Minnesota Transfer, Minn., at an additional charge of six and one-half (6½) cents per 100 lbs., on wheat and articles taking the same rates as described in Rule No. 5 and six (6) cents per 100 lbs. on corn and articles taking same rates as described in Rule 5 and nine (9) cents per 100 lbs. on Flax Seed and Millet Seed, subject to minimum weights provided in Rule No. 45 except that grain originating at Terry, Miles City, Forsyth, Bozeman, Belgrade, Manhattan, Amsterdam, Arceny, Logan, [fol. 59] Three Forks, Willow Creek, Sappington, Whitehall, Butte, Deer Lodge, Lombard, Helena, Garrison, Drummond or Missoula, Mont., billed to Minneapolis, St. Paul, or Minnesota Transfer, Minn., may be reforwarded in the original car and on the original waybill to Duluth, Minn., or Superior, Wis., without additional charge other than the charge for diversion or reconsigning as provided in N. P. Ry. tariff No. 77-M, I. C. C. No. 7218, supplements thereto or reissues thereof (C. F. 17052).

The above exceptions to the addition of the 6.5 cents beyond Minneapolis were made to meet the competition of the Chicago, Milwaukee & St. Paul. The route of that carrier from the same station to Duluth is through Minneapolis.

Complainants contend that rule 33 does not apply to this shipment because it was not "reforwarded" from Minneapolis, within the meaning of the rule, which they urge requires reshipping, and not merely reconsigning; also that, in any event, the rule provides, at most, for a second rate, and the shipper is entitled, under our tariff regulations, to the lower rate resulting from the publication of the rate to Duluth without routing restrictions.

The Northern Pacific shows that the normal and universal routing of shipments tendered without routing instructions is through Brainerd, and not through Minneapolis; that in the tariff naming the rates to Duluth rates to points between Minneapolis and Duluth, directly intermediate to Duluth, are made 4.5 cents higher than to Minneapolis and Duluth; and that under the complainants' interpretation of the tariff there would be a violation of the long-and-short-haul clause of the fourth section of the act.

This shipment was "reforwarded," within the meaning of rule 33. The specification as to reforwarding in the original car, and on the original waybill, is sufficient evidence of the continuity of the original shipment. A reshipped car, or separate shipment within complainants' view, would move under the local rate of 13 cents from Minneapolis to Duluth. The effect of rule 33 is not to provide an additional rate from the original point of shipment to Duluth, but is specifically to supersede, or supplement, the other general provision of the same tariff for a 48-cent rate to Minneapolis and Duluth. In Pioneer Lumber Co. vs. Director General, supra, there was no rule 33, or its equivalent. Also it there appeared that, unlike the present case, "in the past the Northern Pacific tariffs [fol. 60] have specifically provided for the application of the Duluth rates through that point." There is the same general difference between the present case and Independent Elevator Co. vs. M., St. P. & S. S. M. Ry. Co., 73 I. C. C. 521. It must be found that the rate applicable

on this shipment was 54.5 cents, which was the rate charged.

The shipments over the Soo Line were from Bismarck, N. Dak., to Duluth, and from Hoffman, Carlos, and Brooten, Minn., to Superior. The rates were 23.5 cents to Minneapolis and Duluth from Bismarck; 12 cents to Minneapolis and 14 cents to Superior from Brooten; 13 cents to Minneapolis and 14 cents to Superior from Carlos; and 13 cents to Minneapolis and 14.5 cents to Superior from Hoffman. The distance through Minneapolis was 80 miles greater than over the direct line in each instance. The tariff of the Soo Line contained a provision substantially similar to rule 38 of the Northern Pacific, in respect of the addition of 6.5 cents beyond Minneapolis on shipments reforwarded from Minneapolis. It also provided for rates to points between Minneapolis and Duluth higher than over the direct route to Duluth. The situation on the Soo Line is substantially the same as on the Northern Pacific, and the conclusion reached concerning the shipment over the latter route governs the shipments over the Soo Line, which were charged the rates applicable.

The shipments over the Great Northern were very similar to those in No. 16576. They moved from Portland Junction and Buxton, N. D., to Duluth, and from Murray and Hatton, N. D., to Superior. The short-line distances ranged from 322 to 354 miles, and the distances through Minneapolis from 428 to 445 miles, additional distances through Minneapolis ranging from 75 to 112 miles, or from 21 to 35 per cent. The rates applicable to Duluth, Superior, and Minneapolis were 17.5 cents from Hatton, Portland Junction, and Murray, and 16.5 cents from Buxton. The Great Northern tariff did not provide for any addition to the direct rate to Duluth or Superior for transportation beyond Minneapolis. It did provide for rates to points between Minneapolis and Duluth higher than to Duluth.

The Great Northern here contends that tariffs are to be construed in the same way as any other legal document, in accordance with their evident intent, and that the intention of the Great Northern to restrict the Duluth rate to the direct route is evidenced by the general custom of years, [fol. 61] acquiesced in by shippers, by the publication of higher rates to points between Minneapolis and Duluth

than to Duluth, and by its tariff provision for the application of the direct rate over indirect routes in certain instances specifically referred to of record.

The intent of a tariff is not superior to its terms, applied within reason. The absence of routing restrictions and of any addition to that rate provided by tariff, such as the Northern Pacific provided for in its rule 33, made the Duluth rate applicable over any open route designated by the shipper.

We find that complainants in Nos. 16576, 16466 (Sub. No. 1), 16466 (Sub-No. 2), and 16466 (Sub-No. 5), made shipments over the Great Northern and paid and bore the charges thereon; that they were damaged thereby in the amount of the difference between the charges paid and those which would have accrued at the applicable rate; and that they are entitled to reparation, with interest. They should comply with Rule V of the Rules and Practice.

TAYLOR, Commissioner, dissenting:

I do not agree with the majority in their finding that the through rates from the points of origin in question to Duluth and Superior, without the additional 6 or 6.5 cents beyond Minneapolis, were applicable on the shipments moving through Minneapolis over the Great Northern.

I am unable to accept complainants' view that, in the absence of routing restrictions, a shipper has the right to route his traffic when moving over only one line by any route he may select, no matter how circuitous. As illustrated in the record, they insist that if a rate from Granville to Genoa, N. Dak., a distance of 21 miles, was unrestricted as to routing, the shipper could route his traffic via Superior and Minneapolis requiring a haul of 1,100 miles. I am opposed to upholding such a contention, and believe that even where rates are unrestricted as to routing, the shippers must use reasonably direct routes. In the instant case the reasonably direct route was via Willmar and St. Cloud, Minn., and not through Minneapolis involving materially greater hauls and expensive terminal handling at that point.

Paragraph 8 of section 15 confers upon the shipper the right to designate routing of his traffic where joint-line hauls are involved and two or more through routes and

through rates are available. It does not confer this au-
[fol. 62] thority upon the shipper where, as in this case, the movements are over a single line.

To have maintained the through rates from Buxton and other originating points to Superior and Duluth via Minneapolis would have resulted in fourth-section violations at intermediate points between Minneapolis and Superior and Duluth. I am of the opinion that the tariff should be interpreted in such a way as not to produce the unlawful result of a fourth-section violation. The record shows that for many years prior to the movement of the shipments in question the carriers uniformly charged, on similar shipments, the combination rates, consisting of the rate to Minneapolis and the proportional beyond, without protest from the shipper.

By the Commission, Division 3.

George B. McGinty, Secretary. (Seal.)

(Endorsed:) Filed Apl. 19, 1929, Joel M. Dickey, Clerk, by Thomas H. Howard, Deputy.

DEFENDANT'S EXHIBIT 1

INTERSTATE COMMERCE COMMISSION

Before the Interstate Commerce Commission

Docket No. 16576, Filed Dec. 4, 1924

DELMAR COMPANY

vs.

GREAT NORTHERN RAILWAY COMPANY

COMPLAINT FILED BEFORE INTERSTATE COMMERCE COMMISSION

I

The complaint at the time hereinafter mentioned was, and still, is a corporation organized and existing under the Laws of the State of Delaware, with its principal office at Minneapolis, Minnesota. That it is engaged in the busi-

ness of handling, storing, selling and buying grain, and grain products at Minneapolis, Minnesota, and other points.

[fol. 63]

II

That the defendant above named is, and at all times hereinafter mentioned was a common carrier engaged in the transportation of property, wholly by railroad, between points in the States of Wisconsin, Minnesota, North and South Dakota and between other places, and as such common carrier is subject to the provisions of the Interstate Commerce Act.

III

That on, or about August 31, 1922, there was delivered to defendant at Howes Siding, North Dakota 69870 lbs. of wheat in car GN 207183, which was transported to Minneapolis, Minnesota, and there inspected and graded by Minnesota State Inspectors, and purchased by complainant on track; original bill of lading or other proof of ownership being surrendered by complainant to defendant with an exchange bill of lading, reconsigning said car to Delmar Company in care of A. D. Thomson Co. at Great Northern Elevator "S" Superior, Wisconsin; bill of lading "reading" Thru Rate O W B per G. N. Tariff I C C No. A-5588 open route; rate applicable via all Jcts." or similar wording, and was so receipted by defendants Joint Agent, Authority for reconsignment being then carried in defendant tariff I C C No. A-5348, supplement 2 rule 14-A and through rate of 17½¢ per cwt. Howes, North Dakota, to Superior, Wisconsin, being shown in defendants tariff I C C No. A-5588 index No. 487 with no routing restrictions, or specific routing, therefore, rate was, and is applicable via any workable route in accordance with Interstate Commerce Commission Tariff Circular No. 18-A rule 4 (j) and many formal and informal rulings. Defendant collected and retained charges to the amount of 24¢ per cwt. or $45.42 in excess of legal tariff charges.

IV

That on, or about August 30th, 1922, there was delivered to defendant at Rogers, Minnesota, 67650 lbs. of Rye in W. P. car 15167, which was transported to Minneapolis, Min-

nesota, and there handled in all cases the same as the car in the next preceding paragraph (III) except that defendant collected and retained charges to the amount of 12½¢ per cwt. while tariff names a thru rate of 12¢ -er cwt. under index 134.

V

That on, or about July 24, 1922, there was delivered to defendants at Litchfield, Minnesota, 74310 lbs. of corn in G. [fol. 64] N. car No. 13923, which was transported to Minneapolis, Minnesota and there handled in all cases the same as the car in paragraph III above, except that defendant collected and retained charges to the amount of 14½¢ per cwt. while tariff names a thru rate of 14¢ per cwt. under index No. 298.

VI

That on, or about June 23, 1922, there was delivered to defendant at Appleton, Minnesota 69110 lbs. of corn in G. N. car No. 23219 which was transported to Minneapolis, Minnesota and there handled in all cases the same as car in paragraph (III) above; except that defendant collected and retained charges to the amount of 17½¢ per cwt. while tariff names a thru rate of 16¢ under index No. 357.

VII

That on, or about September 10th, 1922 there was delivered to defendant at Holloway, Minnesota 75000 lbs. of oats in CP car No. 290056, which was transported to Minneapolis, Minnesota and there handled in all cases the same as the car in paragraph III above, except that defendant collected and retained charges to the amount of 17½¢ per cwt. while tariff names a thru rate of 15½¢ under index 356.

VIII

That on, or about May 24th, 1922, there was delivered to defendant at Kerkhoven, Minnesota 85810 lbs. of corn in G. N. car No. 21654; 89340 lbs. in G N car No. 22916; and 66460 lbs. in GN car 206883, which was transported to Minneapolis, Minnesota and there handled in all cases the same as car in paragraph III above, except that defendant collected and retained charges to the amount of 17c per cwt. while defendants tariff ICC No. A-5234 (which was then in

effect) names a thru rate of 15¢ under index 351 as amended.

IX

That on, or about, June 1st, 1922, there was delivered to defendant at Albee, South Dakota 94340 lbs. of corn in G. N. car No. 11559, which was transported to Minneapolis, Minnesota and there handled in all cases the same as car in paragraph II above, except that defendant collected and retained charges to the amount of 19¢ per cwt. while tariff names a thru rate of 17½¢ under index 361.

X

That on, or about August 19th, 1922 there was delivered to defendant at Burch, South Dakota, 79630 lbs. of wheat in [fol. 65] G. N. car No. 24717, and on or about August 21st 82310 lbs. of wheat in G. N. car No. 127839, which was transported to Minneapolis, Minnesota, and there handled the same in all cases as car in paragraph (II) above; except that defendant collected and retained charges to the amount of 27¢ per cwt. while tariff names a thru rate of 22½¢ under index 417.

XI

That on, or about August 31st, 1922 there was delivered to defendant at Grover, South Dakota 85910 lbs. of wheat in G. N. car No. 24799; and on or about September 4th, 86410 lbs. of wheat in G. N. car No. 34672; which was transported to Minneapolis, Minnesota, and there handled in all cases the same as car in paragraph (III) above except that defendant collected and retained charges to the amount of 26¢ per cwt. while tariff names a thru rate of 24½¢ under index 368.

XII

That on or about May 5th, 1922 there was delivered to defendant at Osceola, South Dakota, 86450 lbs. of corn in G. N. car No. 24369; which was transported to Minneapolis, Minnesota and there handled in all cases the same as car in paragraph (III) above, except that defendant collected and retained charges to the amount of 25¢ per cwt. while defendant tariff ICC No. A-5234 (which was then in effect) names a thru rate of 24¢ under index 373.

XIII

That on or about August 22nd, 1922 there was delivered to defendant at Plana, South Dakota, 88510 lbs. of wheat in G. N. car No. 17426 which was transported to Minneapolis, Minnesota and there handled in all cases the same as car in paragraph (III) above except that defendant collected and retained charges to the amount of 27½¢ per cwt. while tariff names a thru rate of 24¢ under index 422.

XIV

That on or about August 26, 1922, there was delivered to Complainant at Putney, South Dakota 84560 lbs. of wheat in PRR car No. 22491; on or about August 19th 94140 lbs. in GN Car No. 16337 and 89340 lbs. in GN car No. 122761. On or about August 25th, 26th, and 28th 87860 lbs. of wheat in G. N. car No. 24011; 97470 lbs. of wheat in GN car No. 18690; 72490 lbs. of wheat in GN car No. 205070 and 90720 lbs. of wheat in G. N. car No. 123988; all of which was [fol. 66] transported to Minneapolis, Minnesota and there handled the same as car in paragraph (III) above except that defendant collected and retained charges to the amount of 27½¢ per cwt. on all wheat except 89340 lbs. in G. N. car No. 122761, on which defendant collected and retained 33½¢ per cwt. while tariff names a thru rate of 24¢ under index 421.

XV

That on or about May 25th, 1922 there was delivered to defendant at Sheffield, South Dakota 61110 lbs. of corn in GN car No. 505918 which was transported to Minneapolis, Min-esota, and there handled in all cases the same as paragraph (III) above, except that defendant collected retained charges to the amount of 25¢ per cwt. while defendants tariff ICC No. A-5234 (which was then in effect) names a thru rate of 24¢ under index 375.

XVI

That on or about August 21st, 1922 there was delivered to defendant at Rauville, South Dakota, 99600 lbs. of wheat in G. N. car No. 16563, which was transported to Minneapolis, Minnesota, and there handled in all cases the same as in paragraph (III) above, except that defendant col-

lected and retained charges to the amount of 24½¢ per cwt. while tariff names a thru rate of 23¢ under index 366.

XVII

That on, or about August 21st, 1922, there was delivered to defendant at Tacoma Park, South Dakota, 87460 lbs. of wheat in G. N. car No. 300101, and on or about August 30th, 1922 89710 lbs. of wheat in G. N. car No. 121211; which was transported to Minneapolis, Minnesota and there handled in all cases the same as car in paragraph (II) above except that defendant collected and retained charges to the amount of 27½¢ per cwt. while tariff names a thru rate of 24¢ under index 422, Plana; Tacoma Park being located 3 miles east thereof and under intermediate application rule on page 10 Plana rate applicable.

XVIII

That on or about May 3rd, 1922, there was delivered to defendant at Willow Lakes, South Dakota, 63080 lbs. of corn in G. N. car No. 207280; on or about May 25th, 65080 lbs. of corn in G. N. car No. 22531, on or about July 10th, 88570 lbs. of corn in G. N. car No. 124650 and 87960 lbs. of corn in GN car No. 126213; on or about July 28th, 93440 lbs. of corn in GN car No. 125360, and on or about Septem-
[fol. 67] ber 1st, 98210 lbs. of wheat in GN car No. 34719; all of which was transported to Minneapolis, Minnesota and there handled the same in all cases as car in paragraph (III) above except that defendant collected and retained charges to the amount of 24¢ on the corn and 26½¢ on the wheat while tariff names a thru rate of 22¢ on corn and 24½¢ on wheat under index 371 (Defendants tariff ICC No. A-5234 governing the first two cars in this paragraph and tariff ICC No. A-5588 balance).

XIX

That defendant has collected from complainant and retained charges in excess of legal tariff rates on various other carloads of grain in addition to the above enumerated cases; which amounts are undeterminable at this time owing to the fact that defendant refuses to pay admittedly

due overcharges; therefore, complainant requests that same may be made part of this complaint.

XX

That complainant has in all cases either directly or thru their Agent paid, and in all cases bore the above alleged overcharges.

XXI

That by reason of the facts stated in the foregoing paragraphs complainant has been subjected to the payment of rates, and charges for transportation which when exacted and still are illegal in violation of section 6 of the Interstate Commerce Act. That complainant has been injured thereby to their damage in the sum of $731.48 and such other amount as may be determined.

Wherefore complainant prays that defendant may be required to answer the charges herein; and that after due hearing and investigation an order be made commanding said defendant to cease and desist from the aforesaid violations of said act, and apply in future to the transportation of grain between the origin and destination points named in paragraph III to XX hereof legal and reasonable rates; and also pay to complainant by way of overcharge reparation for the unlawful charges hereinafter alleged the sum of $731.48 with interest or such other sum as, in view of the evidence to be adduced herein, the Commission shall determine that complainant is entitled to as an award for damages under the provision of said act for violation thereof, and that such other and further order or orders be made as the Commission may consider proper in the premises.

[fol. 68] Filed in accordance with paragraph (3) Section (16) Interstate Commerce Act as amended June (7th) 1924.

Dated at Minneapolis, Minnesota, Dec. 2nd, 1924.

Delmar Company, by J. F. Adams, T. Mgr., 502 Flour Exc.

(Endorsed:) Filed Apl. 19, 1929. Joel M. Dickey, Clerk, by Thomas H. Howard, Deputy.

DEFENDANT'S EXHIBIT 2

BEFORE THE INTERSTATE COMMERCE COMMISSION

I. C. C. Docket No. 16,576

DELMAR COMPANY, Plaintiff,

vs.

GREAT NORTHERN RAILWAY COMPANY, Defendant

Answer of Great Northern Railway Company

Defendant for answer to the complaint in this proceeding respectfully states:

1. Admits that it is a corporation engaged in business as a common carrier, as alleged in the complaint.

2. Refers to the tariffs covering the rates named in the complaint and to all other tariffs applicable for a correct statement of the rates referred to or complained of herein, and admits the said rates so far as the same appear in said tariffs.

3. Denies that it has violated or is v-olating any *any* of the statutes or laws of the United States, or that anything done or omitted by it with respect to the subject matter of the said complaint is in violation of law; denies that any of the rates referred to in said complaint are unreasonable, prejudicial, discriminatory or unlawful, or that complainant has been charged or has paid any unreasonable prejudicial, discriminatory or unlawful charges, and denies that it should be subject to any adverse order, and denies that the complainant is entitled to the relief prayed for or any other relief.

4. Each and every allegation of the complaint not hereinbefore admitted is hereby specifically denied.

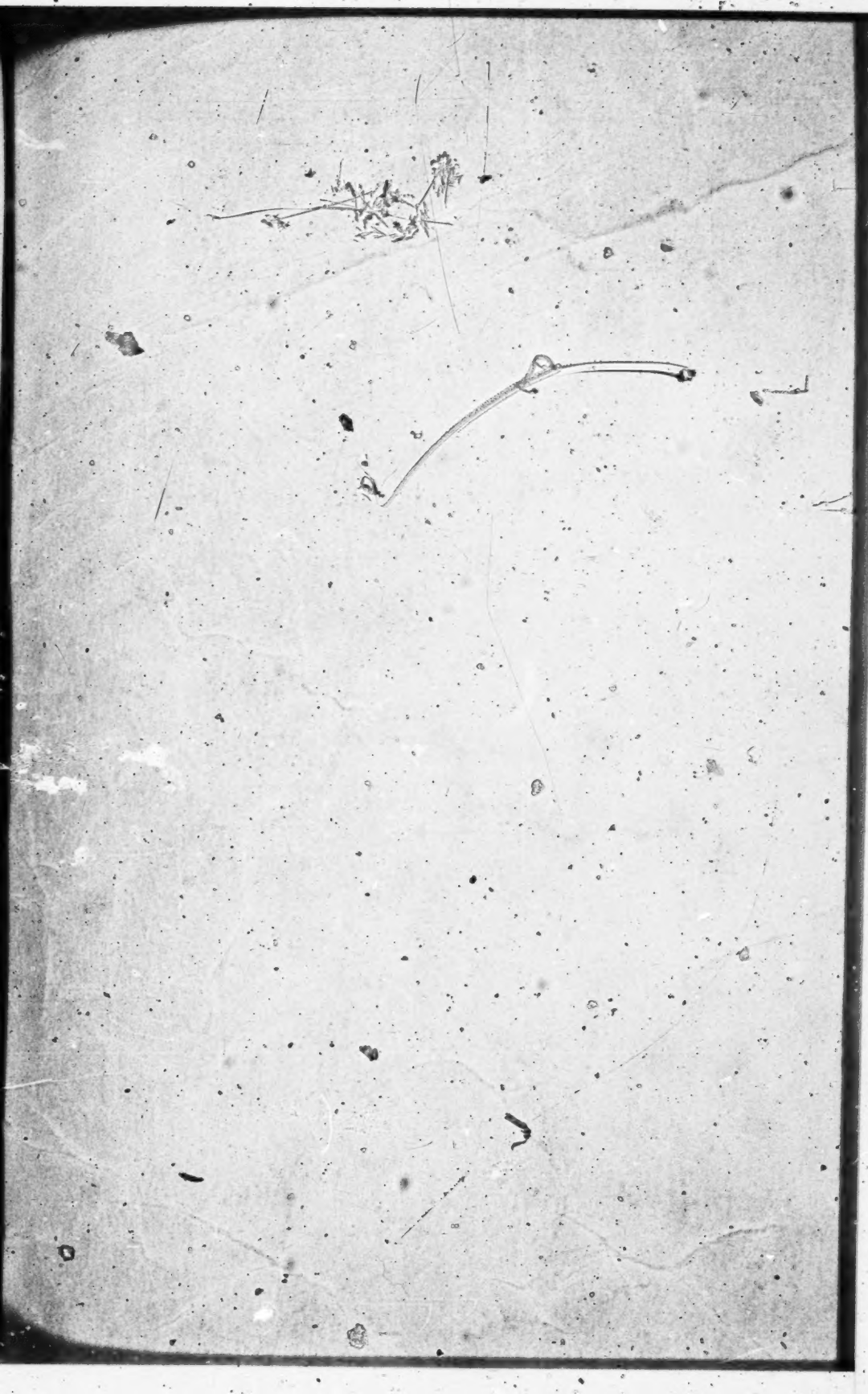
[fols. 69 & 70] Wherefore Defendant prays that the complaint in this proceeding be dismissed.

Dated February 7, 1925.

R. J. Hagman, Attorney for Defendant, 1120 Great Northern Building, Saint Paul, Minnesota.

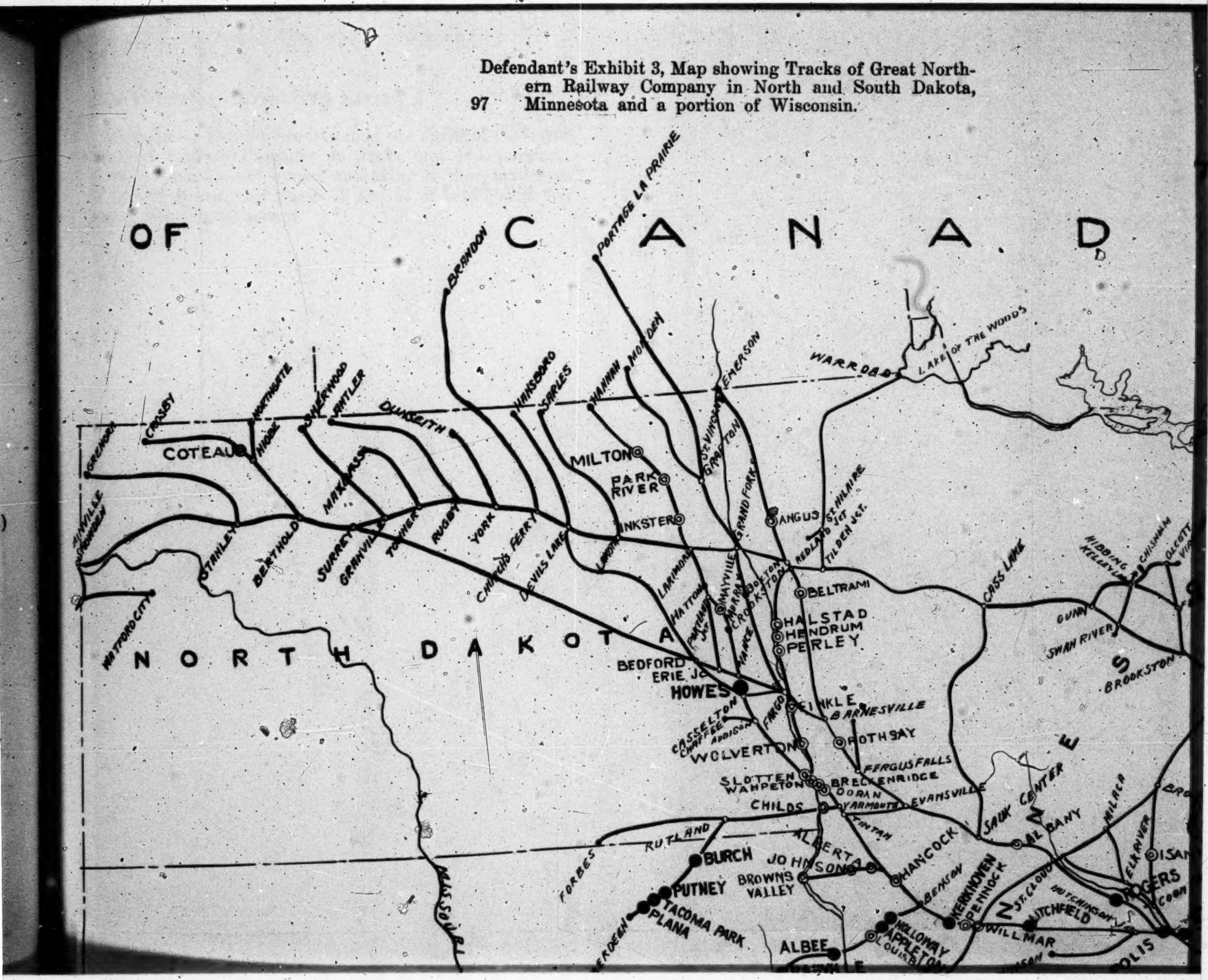
(Endorsed:) Filed Apl. 19, 1929. Joel M. Dickey, Clerk, by Thomas H. Howard, Deputy.

(Here follows Defendant's Exhibit 3, side folios 71 and 72.)



Defendant's Exhibit 3, Map showing Tracks of Great Northern Railway Company in North and South Dakota, Minnesota and a portion of Wisconsin.

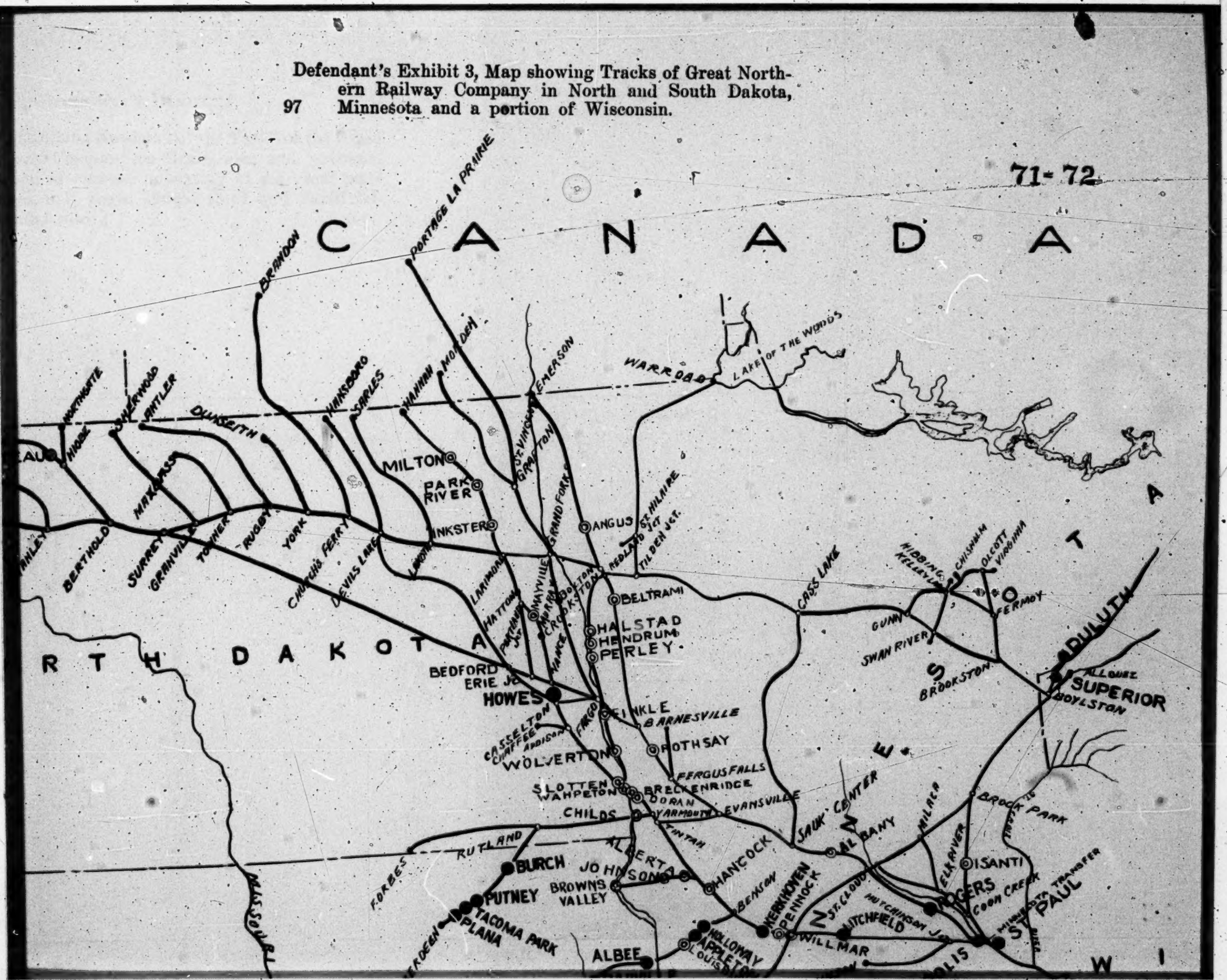
97

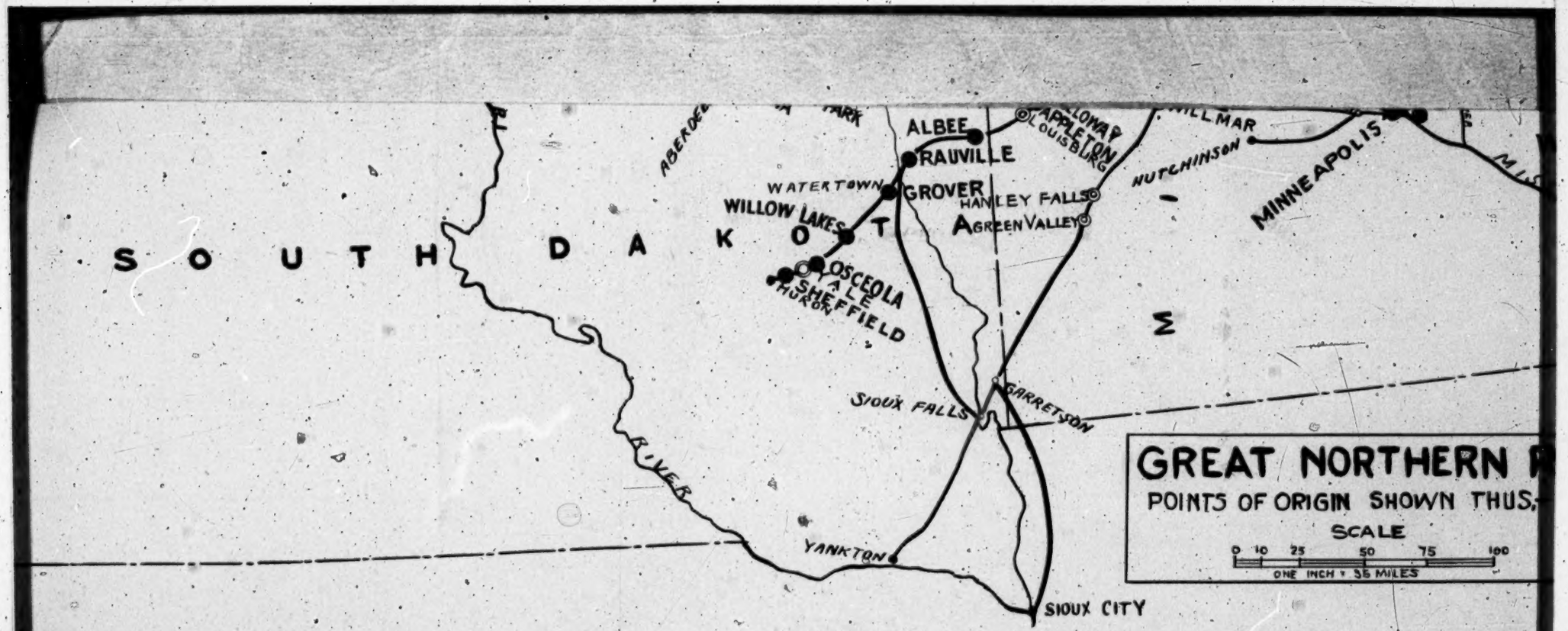


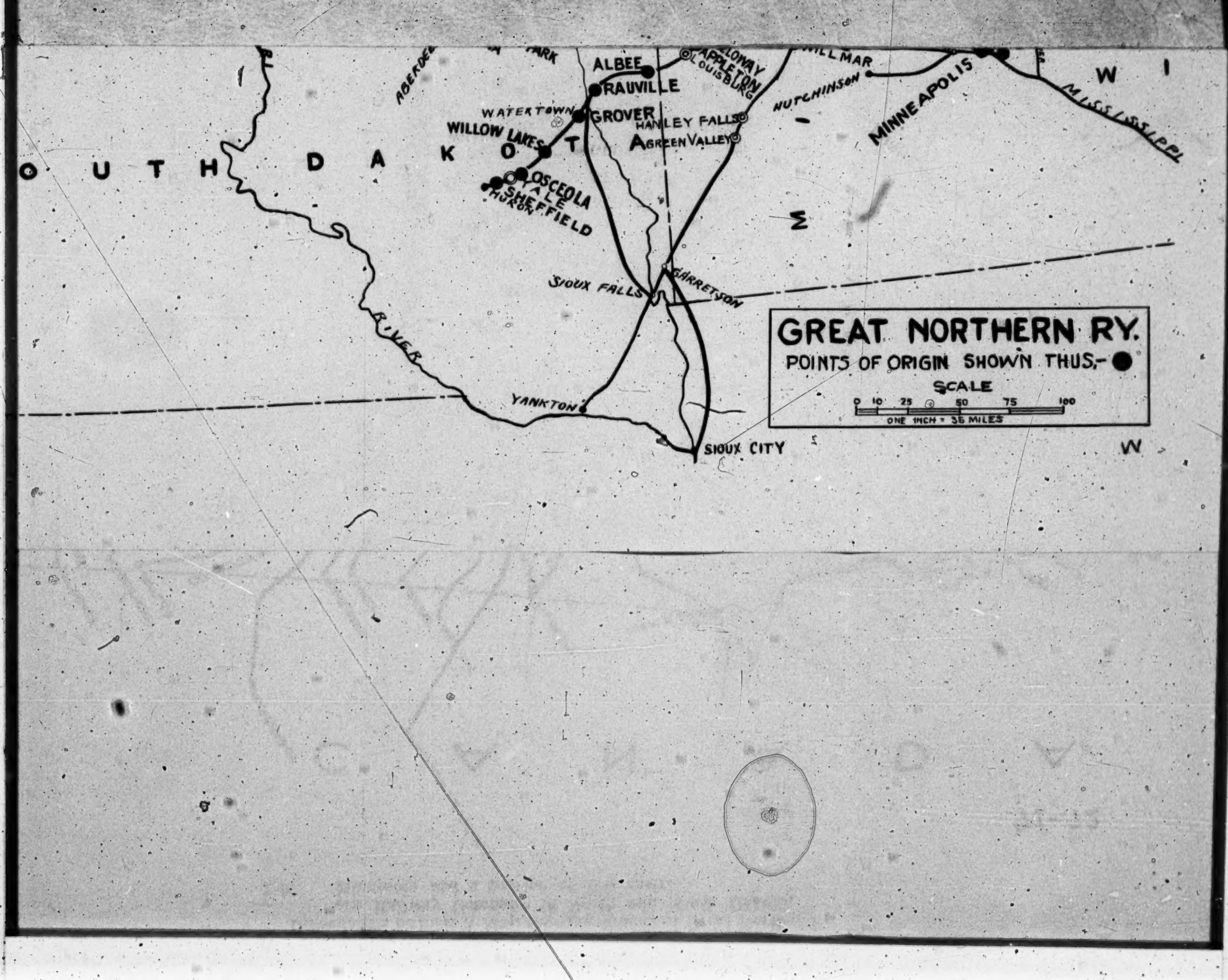
Defendant's Exhibit 3, Map showing Tracks of Great Northern Railway Company in North and South Dakota, Minnesota and a portion of Wisconsin.

97

71-72




ALBEE
RAUVILLE
WATERTOWN
GROVER
WILLOW LAKES
OSCEOLA
ALE
SHEFFIELD
HURON
HANLEY FALLS
GREEN VALLEY
APPLETON
LOUISBURG
WILLMAR
NUTCHINSON
MINNEAPOLIS
SIOUX FALLS
GARRETSON
YANKTON
SIOUX CITY
RIVER
GREAT NORTHERN
POINTS OF ORIGIN SHOWN THUS.
SCALE
0 10 25 50 75 100
ONE INCH = 35 MILES


ALBEE
RAUVILLE
WATERTOWN
GROVER
WILLOW LAKES
HANLEY FALLS
GREEN VALLEY
OSCEOLA
HURON
SHEFFIELD
SIOUX FALLS
GARRETSON
YANKTON
SIOUX CITY
NUTCHINSON
MINNEAPOLIS
MISSISSIPPI
RIVER
GREAT NORTHERN RY.
POINTS OF ORIGIN SHOWN THUS.-
SCALE
0 10 25 50 75 100
ONE INCH = 35 MILES

[fols. 73 & 74] DEFENDANT'S EXHIBIT 4

Defendant's Exhibit 4 consisted of the Tariff of the Great Northern Railway Company on Grain, etc., and, pursuant to the stipulation of counsel appearing at marginal page 81 of this record, only pages 39 and 43 of said Tariff follow in this printed record.

(Here follows exhibit, side folios 75 & 76 and 77 & 78.)

SECTION 1. GENERAL RATES—Continued.

Index No.	BETWEEN		AND St. Paul, Minnesota Transfer or Minneapolis, Minn. (See notes 1 to 16, pages 13 to 17.)			AND Duluth, Cloquet, Minn., or Superior, Wis. (See notes 1 to 16 pages 13 to 17.)		
			Flaxseed and articles taking same rates, as per W. T. L. Rules, Circular No. 1-P, I. C. C. No. A-1203, of E. B. Boyd, Agent, supplements thereto and reissues thereof.	Wheat Wheat Flour and articles taking same rates, as per W. T. L. Rules, Circular No. 1-P, I. C. C. No. A-1203, of E. B. Boyd, Agent, supplements thereto and reissues thereof.	Corn, Rye, Oats, Barley and articles taking same rates, as per W. T. L. Rules, Circular No. 1-P, I. C. C. No. A-1203, of E. B. Boyd, Agent, supplements thereto and reissues thereof.	Flaxseed and articles taking same rates, as per W. T. L. Rules, Circular No. 1-P, I. C. C. No. A-1203, of E. B. Boyd, Agent, supplements thereto and reissues thereof.	Wheat Wheat Flour and articles taking same rates, as per W. T. L. Rules, Circular No. 1-P, I. C. C. No. A-1203, of E. B. Boyd, Agent, supplements thereto and reissues thereof.	Corn, Rye, Oats, Barley and articles taking same rates, as per W. T. L. Rules, Circular No. 1-P, I. C. C. No. A-1203, of E. B. Boyd, Agent, supplements thereto and reis-ues thereof.
			RATES IN CENTS PER 100 LBS.					
345	† Dalton	Iowa	25	18	16	31	23	20½
346	† Merrill	"	25	18	16	31	23	20½
347	† Hinton	"	25	18	16	31	23	20½
349	†*Leeds	"	25	18	16	31	23	20½
350	† Sioux City	"	25	ⓓ 18	ⓓ 16	31	ⓓ 23	ⓓ 20½
350a	†*Level Siding	S. D.	27	19½	17½	34	26½	24
350b	† Crooks	"	27	19½	17½	34	26½	24
350c	† Lyons	"	27	19½	17½	34	26½	24
350d	† Colton	"	27	19½	17½	34	26½	24
350e	†*Huntimer	"	27	19½	17½	34	26½	24
350f	† Chester	"	27	19½	17½	34	26½	24
350g	† Wentworth	"	27	19½	17½	34	26½	24
350h	† Rutland	"	27	19½	17½	34	26½	24
350i	† Nunda	"	27	19½	17½	34	26½	24
350j	† Sinai	"	27	19½	17½	34	26½	24
350k	†*Como	"	27	19½	17½	34	26½	24
350l	† Arlington	"	27	19½	17½	34	26½	24
350m	†*Royhl	"	27	19½	17½	34	26½	24
350n	† Badger	"	27	19½	17½	34	26½	24
350o	† Lake Norden	"	27	19½	17½	34	26½	24
350p	† Hayti	"	27	19½	17½	34	26½	24
350q	† Thomas	"	27	19½	17½	34	26½	24
350r	†*Foley	"	27	19½	17½	34	26½	24

Index No.	BETWEEN		AND St. Paul, Minnesota Transfer or Minneapolis, Minn. (See Notes 1 to 16 pages 13 to 17)			AND Duluth, Minn., or Superior, Wis. (See Notes 1 to 16 pages 13 to 17)		
			Flaxseed and other articles listed in Group A, page 11.	Wheat and other articles listed in Group B, page 11.	Corn and other articles listed in Group C, page 11.	Flaxseed and other articles listed in Group A, page 11.	Wheat and other articles listed in Group B, page 11.	Corn and other articles listed in Group C, page 11.
			RATES IN CENTS PER 100 LBS.					
350s	Pennock	Minn.	13½	12	11	18	16	14½
351	Kerkhoven	"	13½	12	11	19	16½	15
352	Murdock	"	13½	12	11	19	16½	15
353	De Graff	"	14	12½	11½	19	16½	15
354	Benson	"	14	12½	11½	19	16½	15
355	Danvers	Minn.	14	12½	11½	19½	17	15½
356	Halloway	"	14	12½	11½	19½	17	15½
357	Appleton	"	15	13	11½	19½	17½	16
358	Louisburg	"	15	13	11½	20½	17½	16
359	Bellingham	"	15	13	11½	20½	17½	16
360	Nassau	"	15½	13½	12	20½	18	16

ⓓFor proportional rates on shipments originating beyond, see W. F. T. B. Tariff No. 157-C, I. C. C. No. A-1163 (issued by E. B. Boyd, Agent), G. N. C. F. O. No. 1669-D, supplements thereto and reissues thereof.
*No Agent. Freight charges must be prepaid.
†Rates applying between these stations and St. Paul, Minneapolis and Minnesota Transfer will also apply between these stations and St. Cloud, Minn.

SECTION 1. GENERAL RATES—Continued.

Index No.	BETWEEN	AND: St. Paul, Minnesota Transfer or Minneapolis, Minn. (See Notes 1 to 16, pages 13 to 17.)			AND: Duluth, Minn., or Superior, Wis. (See Notes 1 to 16, pages 13 to 17.)		
		Flaxseed and other articles listed in Group D, page 11.	Wheat and other articles listed in Group E, page 11.	Corn and other articles listed in Group F, page 11.	Flaxseed and other articles listed in Group D, page 11.	Wheat and other articles listed in Group E, page 11.	Corn and other articles listed in Group F, page 11.
		RATES IN CENTS PER 100 LBS.					
467	Clifford.....N. D.	21	17½	16	21	17½	16
468	*Roseville..... "	21	17½	16	21	17½	16
469	Portland..... "	21	17½	16	21	17½	16
470	Absaraka.....N. D.	21	17½	16	21	17½	16
471	Ayr..... "	22½	18	16	22½	18	16
471-A	*Dartmoor..... "	23	19½	17½	23	19½	17½
472	Page..... "	23½	19½	17½	23½	19½	17½
473	Colgate..... "	23½	19½	17½	23½	19½	17½
474	Hope..... "	23½	19½	17½	23½	19½	17½
475	Blabon..... "	23½	19½	17½	23½	19½	17½
476	Finley..... "	23½	19½	17½	23½	19½	17½
477	Sharon..... "	23½	19½	17½	23½	19½	17½
478	Aneta..... "	23½	19½	17½	23½	19½	17½
479	Kloten..... "	23½	19½	17½	23½	19½	17½
480	McVille..... "	23½	19½	17½	23½	19½	17½
481	Pekin..... "	23½	19½	17½	23½	19½	17½
482	Tolna..... "	23½	19½	17½	23½	19½	17½
483	Hamar..... "	23½	19½	17½	23½	19½	17½
484	Warwick..... "	23½	19½	17½	23½	19½	17½
485	Tokio..... "	23½	19½	17½	23½	19½	17½
486	Narrows..... "	23½	19½	17½	23½	19½	17½
487	*Howes.....N. D.	20½	17½	16	20½	17½	16
488	Amenia..... "	20½	17½	16	20½	17½	16
489	Arthur..... "	20½	17½	16	20½	17½	16
490	Hunter..... "	20½	17½	16	20½	17½	16
491	*Greenfield..... "	20½	17½	16	20½	17½	16
492	*Preston..... "	20½	17½	16	20½	17½	16
493	Blanchard..... "	20½	17½	16	20½	17½	16
494	*Volga..... "	20½	17½	16	20½	17½	16
495	*Murray..... "	20½	17½	16	20½	17½	16
496	Mayville..... "	20½	17½	16	20½	17½	16
497	*Ames..... "	20½	17½	16	20½	17½	16
498	*Portland Jct..... "	20½	17½	16	20½	17½	16
499	Hatton..... "	20½	17½	16	20½	17½	16
500	Northwood..... "	20½	17½	16	20½	17½	16
501	Kempton..... "	20½	17½	16	20½	17½	16
502	Fargo.....N. D.	19	16½	15	19	16½	15
502a	*Reed..... "	19	16½	15	19	16½	15
502b	Prosper..... "	19½	17	15½	19½	17	15½
502c	*Vance..... "	20½	17½	16	20½	17½	16
502e	*Bedford..... "	23½	19½	17½	23½	19½	17½
502f	*Walden..... "	23½	19½	17½	23½	19½	17½
502g	Pillsbury..... "	23½	19½	17½	23½	19½	17½
502h	Luverne..... "	23½	19½	17½	23½	19½	17½
502	Karnak..... "	24½	20	18	24½	20	18
502j	Hannaford..... "	24½	20	18	24½	20	18
502k	Revere..... "	24½	20	18	24½	20	18
502l	Sutton..... "	24½	20	18	24½	20	18
502m	Glenfield..... "	24½	20	18	24½	20	18
502n	Juanita..... "	24½	20	18	24½	20	18
502o	Grace City..... "	24½	20	18	24½	20	18
502p	Brantford..... "	24½	20	18	24½	20	18
502q	*Dundas..... "	24½	20	18	24½	20	18
502r	New Rockford..... "	24½	20	18	24½	20	18

See note Sp 14

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SECTION 1. GENERAL RATES—Continued.

Index No.	BETWEEN	AND: St. Paul, Minnesota Transfer or Minneapolis, Minn. (See Notes 1 to 16, pages 13 to 17.)			AND: Duluth, Minn., or Superior, Wis. (See Notes 1 to 16, pages 13 to 17.)		
		Flaxseed and other articles listed in Group D, page 11.	Wheat and other articles listed in Group E, page 11.	Corn and other articles listed in Group F, page 11.	Flaxseed and other articles listed in Group D, page 11.	Wheat and other articles listed in Group E, page 11.	Corn and other articles listed in Group F, page 11.
		RATES IN CENTS PER 100 LBS.					
467	Clifford.....N. D.	21	17½	16	21	17½	16
468	*Roseville..... "	21	17½	16	21	17½	16
469	Portland..... "	21	17½	16	21	17½	16
470	Absaraka.....N. D.	21	17½	16	21	17½	16
471	Ayr..... "	22½	18	16	22½	18	16
471-A	*Dartmoor..... "	23	19½	17½	23	19½	17½
472	Page..... "	23½	19½	17½	23½	19½	17½
473	Colgate..... "	23½	19½	17½	23½	19½	17½
474	Hope..... "	23½	19½	17½	23½	19½	17½
475	Blabon..... "	23½	19½	17½	23½	19½	17½
476	Finley..... "	23½	19½	17½	23½	19½	17½
477	Sharon..... "	23½	19½	17½	23½	19½	17½
478	Aneta..... "	23½	19½	17½	23½	19½	17½
479	Kloten..... "	23½	19½	17½	23½	19½	17½
480	McVille..... "	23½	19½	17½	23½	19½	17½
481	Pekin..... "	23½	19½	17½	23½	19½	17½
482	Tolna..... "	23½	19½	17½	23½	19½	17½
483	Hamar..... "	23½	19½	17½	23½	19½	17½
484	Warwick..... "	23½	19½	17½	23½	19½	17½
485	Tokio..... "	23½	19½	17½	23½	19½	17½
486	Narrows..... "	23½	19½	17½	23½	19½	17½
487	*Howes.....N. D.	20½	17½	16	20½	17½	16
488	Amenia..... "	20½	17½	16	20½	17½	16
489	Arthur..... "	20½	17½	16	20½	17½	16
490	Hunter..... "	20½	17½	16	20½	17½	16
491	*Greenfield..... "	20½	17½	16	20½	17½	16
492	*Preston..... "	20½	17½	16	20½	17½	16
493	Blanchard..... "	20½	17½	16	20½	17½	16
494	*Volga..... "	20½	17½	16	20½	17½	16
495	*Murray..... "	20½	17½	16	20½	17½	16
496	Mayville..... "	20½	17½	16	20½	17½	16
497	*Ames..... "	20½	17½	16	20½	17½	16
498	*Portland Jct..... "	20½	17½	16	20½	17½	16
499	Hatton..... "	20½	17½	16	20½	17½	16
500	Northwood..... "	20½	17½	16	20½	17½	16
501	Kempton..... "	20½	17½	16	20½	17½	16
502	Fargo.....N. D.	19	16½	15	19	16½	15
502a	*Reed..... "	19	16½	15	19	16½	15
502b	Prosper..... "	19½	17	15½	19½	17	15½
502c	*Vance..... "	20½	17½	16	20½	17½	16
502e	*Bedford..... "	23½	19½	17½	23½	19½	17½
502f	*Walden..... "	23½	19½	17½	23½	19½	17½
502g	Pillsbury..... "	23½	19½	17½	23½	19½	17½
502h	Luverne..... "	23½	19½	17½	23½	19½	17½
502	Karnak..... "	24½	20	18	24½	20	18
502j	Hannaford..... "	24½	20	18	24½	20	18
502k	Revere..... "	24½	20	18	24½	20	18
502l	Sutton..... "	24½	20	18	24½	20	18
502m	Glenfield..... "	24½	20	18	24½	20	18
502n	Juanita..... "	24½	20	18	24½	20	18
502o	Grace City..... "	24½	20	18	24½	20	18
502p	Brantford..... "	24½	20	18	24½	20	18
502q	*Dundas..... "	24½	20	18	24½	20	18
502r	New Rockford..... "	24½	20	18	24½	20	18
502s	*Munster..... "	24½	20	18	24½	20	18

*No Agent. Freight charges must be prepaid.

See note Sp 14

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[fol. 79] DEFENDANT'S EXHIBIT 5

Great Northern G. F. O. 1240-C, I. C. C. No. A-5348

Effective November 18, 1921, in Supplement Number 1

Rule 2-A Cancels Rule 2. Freight Rate Applicable: These rules and charges will apply whether shipments are handled at local rates, joint rates, or combination of intermediate rates. The through rate to be applied under these rules is the rate from point of origin via the diversion, reconsigning or reforwarding point to final destination in effect on date of shipment from point of origin. If the rate from original point of shipment to final destination is not applicable through the point at which the car is diverted, reconsigned or reforwarded, in connection with this line, the tariff rates in effect to and from the diversion, reconsigning or reforwarding point will apply, plus diversion or reconsigning charge. (See Note.)

NOTE.—Interstate traffic moving between Minot, N. D., or points west thereof and points on G. N. Ry. lines, Surrey, N. D., to St. Paul, Minneapolis and Minnesota Transfer, Minn., or beyond, will come under the application of this rule allowing diversion or reconsignment in transit when handled via the line through Devils Lake, Grand Forks and Fargo, N. D., as well as via the lines through New Rockford, Casselton, N. D., Breckenridge and Willmar, Minn., or Fargo, N. D., Fergus Falls and St. Cloud, Minn., providing no backhaul is involved.

(Endorsed:) Filed Apl. 19, 1929. Joel M. Dickey, Clerk, by Thomas H. Howard, Deputy.

DEFENDANT'S EXHIBIT 6

Great Northern G. F. O. 1250-D, I. C. C. A-5712

Effective September 23rd, 1923, in Supplement No. 12

Application of Rates

*Directing Route.—The rates in this tariff, as amended, applying locally between points on the Great Northern Ry.,

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* Change other than advance or reduction.

or jointly with the Great Northern Ry., are only applicable over the shortest mileage of the Great Northern Ry. as shown in Great Northern Ry. Table of Distances No. 400-A, I. C. C. No. A-4089, supplements thereto or reissuse thereof, except as may be otherwise specifically provided or unless shipments are otherwise handled for carrier's convenience.

[fol. 80] (Endorsed:) Filed Apl. 19, 1929. Joel M. Dickey, Clerk, by Thomas H. Howard, Deputy.

DEFENDANT'S EXHIBIT 7

Statement Showing from Points on Great Northern Ry. from Which Actual Shipments of Grain Moved to Minneapolis, Minnesota, and were Subsequently Reconsigned to Superior, Wisconsin

1. Shortest mileage via direct route to Superior, Wis.
2. Shortest mileage via Minneapolis to Superior, Wis.
3. Additional mileage route via Minneapolis compared with direct route.

	Shortest mileage to Superior, Wisc.		Additional mileage via Minneapolis	
Point of origin	Direct route	Via Minneapolis	Miles	Per cent
Angus, Minnesota	298.4	456.3	166.9	57
Beltrami, Minnesota	282.5	417.2	134.7	48
Buxton, No. Dak.	318.1	430.2	112.1	35
Inkster, No. Dak.	339.4	485.3	145.9	43
Mentor, Minnesota	239.8	473.8	234.0	98

(Endorsed:) Filed Apl. 19, 1929. Joel M. Dickey, Clerk, by Thomas H. Howard, Deputy.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 81] IN UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

No. 8821

GREAT NORTHERN RAILWAY COMPANY, Appellant,

vs.

DELMAR COMPANY, Appellee

STIPULATION AS TO PRINTING RECORD—Filed Feb. 3, 1930

It is hereby stipulated and agreed by the parties hereto, by their respective counsel, that pages 39 and 43 of defendant's Exhibit No. 4, which is a tariff filed with the Interstate Commerce Commission consisting of 58 pages and 5 supplements, are the only portions of said Exhibit No. 4 which need be reproduced and included in the transcript of record by the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, for the reason that said pages, which show the rates on grain from Kerkhoven, Halloway and Appleton, Minnesota, and from Howes, North Dakota, to Superior, Wisconsin, claimed by plaintiff as applicable to its shipments from Kerkhoven, Halloway and Appleton to Superior, are typical of the manner and form in which the said tariff Exhibit No. 4 shows all of the rates from the country stations to Superior which plaintiff contends were applicable to its shipments involved in this proceeding.

It is further hereby stipulated and agreed that the only portion of defendant's Exhibit No. 3, which is a blue print map, which need be reproduced and included in the transcript of record is that including the states of Minnesota, [fol. 82] North Dakota and South Dakota, and the eastern edge of Wisconsin, including Superior, as the other portions of said map are immaterial to any issue in this proceeding.

Dated this 31st day of December, 1929.

F. G. Dorety, R. J. Hagman, J. H. Mullally, Attorneys for Appellant. Shaw, Safford, Putman & Shaw, Attorneys for Appellee.

[File endorsement omitted.]

[fol. 83] Appearances of counsel omitted in printing.

[fol. 84] Minute entry of argument and submission, May 20, 1930, omitted in printing.

[fol. 85] IN UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT, MAY TERM, A. D. 1930

No. 8821

GREAT NORTHERN RAILWAY COMPANY, Appellant,

vs.

DELMAR COMPANY, Appellee

Appeal from the District Court of the United States for the District of Minnesota

Mr. R. J. Hagman (Mr. F. G. Dorety and Mr. J. H. Mulally were with him on the brief) for appellant.

Mr. Fred W. Putnam (Mr. Frank W. Shaw, Mr. Orren E. Safford, Mr. Wilbur D. Shaw and Mr. Sam W. Campbell were with him on the brief) for appellee.

Before Stone and Van Valkenburgh, Circuit Judges, and Scott, District Judge

OPINION—Filed Sept. 13, 1930

STONE, Circuit Judge, delivered the opinion of the court.

This is an action to recover reparation for a freight overcharge. The matter was first presented to the Interstate Commerce Commission which found there had been an overcharge and declared reparation. The railway, having failed to pay the amount found due by the Commission, the present suit resulted. From the judgment according reparation this appeal is brought.

The facts here are not in dispute and are as follows: These shipments were of carloads of grain originating on various points in Minnesota, North and South Dakota,

upon the line of appellant. All of them were consigned to Minneapolis and there later sent (by reconsignment without breakage of bulk in the same cars) to Superior, [fol. 86] Wisconsin. Appellant had in force rate tariffs prescribing certain rates from the points of origin of these shipments to Superior, rates to Minneapolis and "proportional" rates from Minneapolis to Superior. In the instance of each shipment there was a shorter mileage route from the point of origin to Superior and in each instance the rate to Superior was less than the combination of the rate to Minneapolis plus the proportional rate from Minneapolis to Superior. The tariffs covering rates from the points of origin to Superior did not indicate that such rates were upon any particular route. The distances from the points of origin to Superior via Minneapolis were greater than those direct from points of origin to Superior—the greatest divergence being twenty-three per cent. These shipments originated west or north of west of Minneapolis and Superior is north and slightly east of Minneapolis. The carrier applied the Minneapolis plus the proportional Superior rate to these shipments, thus, making a higher charge than the rates applying from points of origin to Superior direct It is for this difference in charge that this action is brought.

The issues here involved have to do with the proper construction of this tariff. Several points have been briefed and argued but they may be resolved into two questions. The first is whether a rule of tariff construction repeatedly announced by the Commission and applied in this case is lawful and proper, and, second, whether the Commission properly applied that rule to the facts of this case.

I

The rule of construction employed by the Commission is that where there is more than one route from a point of origin to destination, a rate between those points applies to a shipment over any one of those routes unless that route is unreasonably circuitous or unless the carrier has limited the rate in the tariff to a particular route designated therein. This rule has been repeatedly announced and applied by the Commission (Mason Bros. v. S. Pac. Co., 28 I. C. C. 402; Van Dusen Harrington Co. v. C. M.

& St. P. Ry. Co., 47 I. C. C. 59; Leeds L. Co. v. Director General, 59 I. C. C. 243; Freeman Grain Co. v. Director General, 68 I. C. C. 559; Pioneer L. Co. v. Director General, 74 I. C. C. 288; Baker-Reid L. Co. v. B. & O. R. R. Co., 74 I. C. C. 489; Richardson Sand Co. v. Director General, 89 I. C. C. 555; Steinhardt & Kelly v. Erie R. R. Co., 96 I. C. C. 229; Scott County Farm Bureau v. A. & V. Ry. [fol. 87] Co., 101 I. C. C. 357; Browne-Hinton Wholesale Grocery Co. v. Great Northern Ry. Co., 102 I. C. C. 237; Northwestern Fruit Exchange v. Great Northern Ry. Co., 128 I. C. C. 538; Atwood Davis Sand Co. v. C. N. W. R. Co., 136 I. C. C. 471). Where a departmental ruling or construction has been of long standing and application it should be accepted unless "plainly wrong" (Universal Battery Co. v. United States, 281 U. S. —; Brewster v. Gage, 280 U. S. 327, 336; United States v. Jackson, 280 U. S. 183, 193; Luckenbach S. S. Co. v. United States, 280 U. S. 173, 182). This is particularly true where the subject matter of the regulation requires uniformity and is technical in character—as are railway rate tariffs—(Board of R. R. Comm. v. Great Northern Ry. Co., 281 U. S. —). The rule of tariff construction involved here is firmly established in statement and application by the Commission (cases first above cited). It should not be set aside or disregarded unless clearly opposed to law or unreasonable. The reasoning creating the rule is that the carrier may, if it has a particular route in mind for a particular tariff, easily express its intention in the tariff; that not to do so, leaves the tariff difficult of construction for the shipper and the local agent of the carrier; that in opening the door for more than one meaning the tariff creates a situation where different interpretations by different local agents might result in discrimination between shippers. The reasoning impresses us as being essentially sound. Therefore, the rule of construction of the Commission should be and is approved.

The insistence of the carrier that its intention and its custom of sending direct shipments otherwise than through Minneapolis does not have any weight when applied to the above rule of construction because tariffs "are construed according to their language, and the intention of the framers is not controlling" (Baker-Reid L. Co. v. B. & O. R. R. Co., 74 I. C. C. 489, 491; also see Charles Boldt

Co. v. P. C. C. & St. L. Ry. Co., 42 I. C. C. 308, 310), and a custom of routing by the carrier is not material (Kentucky L. Co. v. St. L.-San F. Ry. Co., 51 I. C. C. 203, 204). The carrier could easily have protected itself from any doubt by merely stating its intention in the tariff and, thus, accomplish its result without any uncertainty or confusion.

The contention of the carrier that to adopt the above rule as applied to these facts would result in a violation of the "long and short haul" clause of Section 4 of the [fol. 88] Interstate Commerce Act (U. S. C. A. Title 49, Section 4) is not well made. That section applies to "the same line or route in the same direction, the shorter being included within the longer distance". As to these shipments, the shorter haul is not included within the longer distance. The question here is as to different routes between the same termini. The evil which that section was intended to do away with is well known and it had nothing to do with a situation such as is here presented. The construction contended for would take away all power of the carrier to select a choice of routes between the same termini unless it made a difference in the rate. It is clear that such a choice is very often to the advantage both of the carrier and the shipping public; that there could be no useful purpose in forbidding such a choice and that it was not the intention of the above section to announce a prohibition of this character.

II

The Commission is supported by substantial evidence in its determination of the facts in this case. The above rule has application only to routes which are reasonably circuitous. It is obvious that what is reasonable, in the above sense, is dependent upon circumstances. Here, the facts are that the movement on the shortest or on the longest routes involved was always away from the point of origin and near to the point of ultimate destination (Superior, Wisconsin), and that the longer route was a thoroughly feasible, workable route which the carrier might and could easily use. The greatest mileage divergence of any of these shipments was twenty-three per cent (see Scott County Farm Bureau v. A. & V. Ry. Co.,

101 I. C. C. 357, where one route was about three times as long as the most direct route).

Conclusion

The judgment of the trial court should be and is affirmed.

[fol. 89] In United States Circuit Court of Appeals, Eighth Circuit

No. 8821

Great Northern Railway Company, Appellant,

vs.

Delmar Company.

Judgment—September 16, 1930

Appeal from the District Court of the United States for the District of Minnesota

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Minnesota, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed with costs; and that the Delmar Company have and recover against the Great Northern Railway Company the sum of Twenty Dollars for its costs herein and have execution therefor.

[fol. 90] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 91] Supreme Court of the United States

Order Allowing Certiorari—Filed January 19, 1931

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is

granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 35,485. U. S. Circuit Court of Appeals, Eighth Circuit. Term No. 563. Great Northern Railway Company, petitioner, vs. Delmar Company. Petition for a writ of certiorari and exhibit thereto. Filed November 24, 1930. File No. 35,485.

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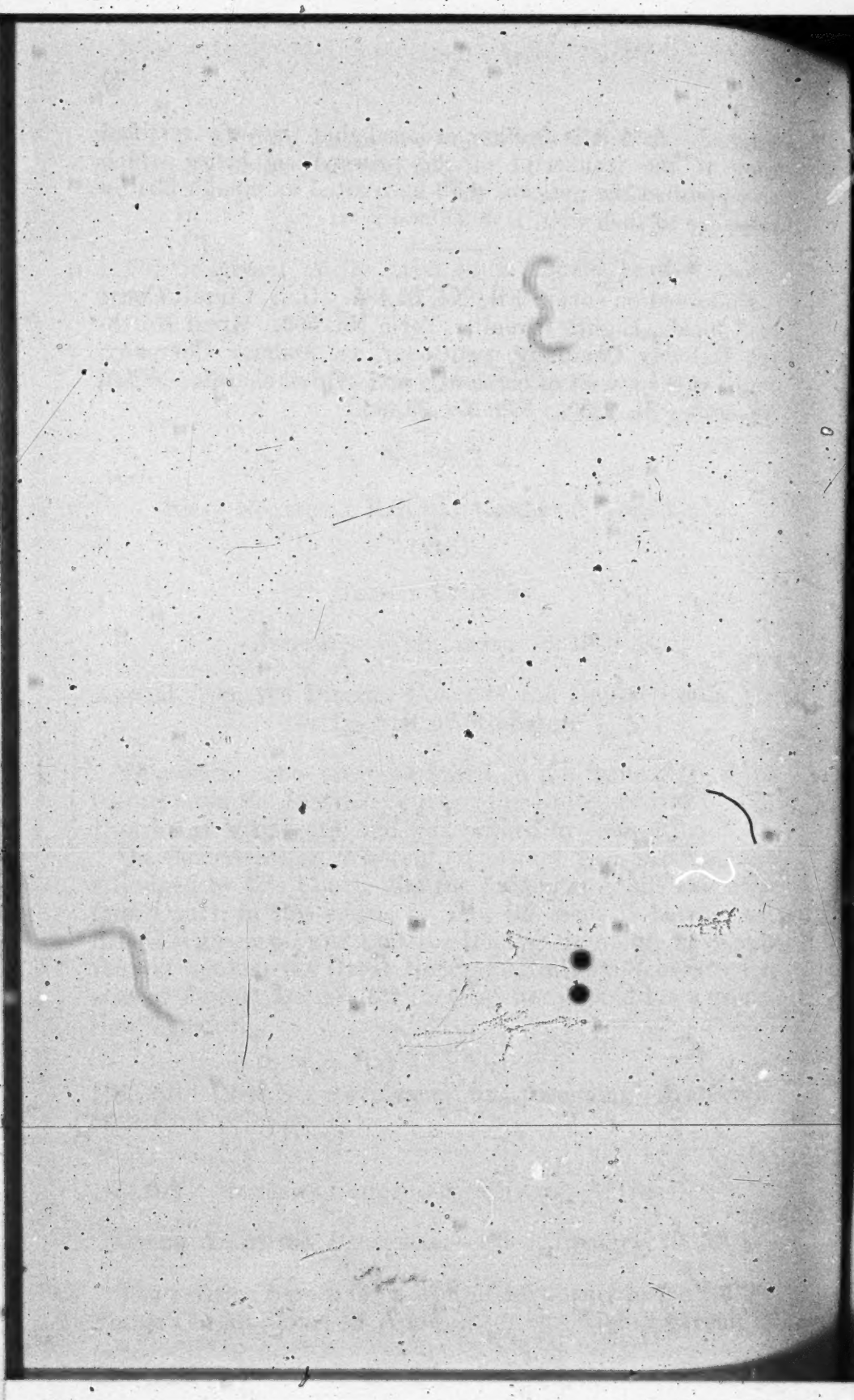

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 563

GREAT NORTHERN RAILWAY COMPANY,

Petitioner,

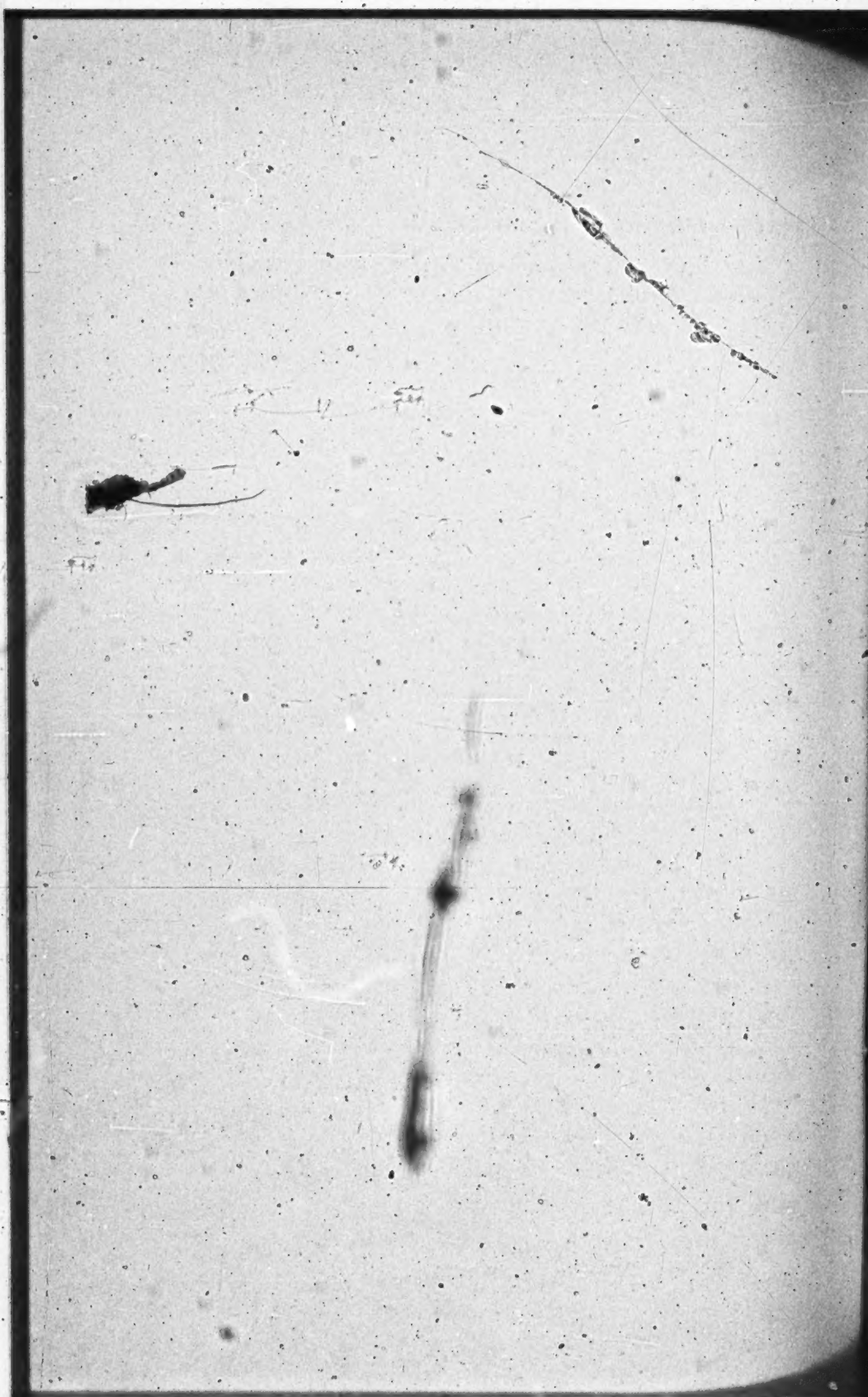
vs.

DELMAR COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

F. G. DORETY,
R. J. HAGMAN,
Counsel for Petitioner.



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. ——

GREAT NORTHERN RAILWAY COMPANY,

Petitioner,

vs.

DELMAR COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The petition of the Great Northern Railway Company respectfully shows to this Honorable Court:

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This proceeding involves the interpretation of a tariff filed with the Interstate Commerce Commission. A question of law only is involved, there being no dispute as to the facts. The precise question is: Where a tariff names a rate for trans-

portation between two points on the same railroad and is silent as to the route over which the rate applies, is the rate applicable only over the direct route between point of origin and destination or is it also applicable over circuitous routes?

The Delmar Company, a corporation engaged in buying and selling grain at Minneapolis, Minn., brought action in the District Court of the United States for the District of Minnesota against petitioner, Great Northern Railway Company, to recover $648.84, the amount of alleged excessive and unlawful charges collected by petitioner for the transportation of 26 carloads of grain. The shipments originated at numerous country stations on petitioner's railroad in Minnesota, North Dakota and South Dakota (see map, Rec. p. 72), were consigned by the various shippers to Minneapolis, were purchased by the Delmar Company and after arrival at Minneapolis were reconsigned by that company in the same cars to Superior, Wis., where delivery was made. The entire transportation was over the lines of petitioner. On each of these shipments petitioner collected its published local tariff rate applicable from the country station to Minneapolis, plus its published proportional tariff rate from Minneapolis to Superior. This combination of rates to and from Minneapolis was higher than the tariff rate for transportation from the country station to Superior, and the Delmar Company seeks to recover the difference (Rec. p. 22 *et seq.*).

The direct routes via petitioner's railroad from the country stations involved to Superior are not through Minneapolis. The routes via Minneapolis are circuitous, being from 43.7 miles to 75.7 miles, or from 12% to 23%, longer than the direct routes. Petitioner's tariff naming the charges from the country stations to Superior at the time these shipments moved was silent as to the routes over which the rates would apply. Peti-

tioner contends that under these circumstances the Court should find, as a matter of law, that the rates from the country stations to Superior applied only when the shipments moved over the direct routes to Superior and did not apply to shipments moving over the circuitous routes through Minneapolis which were taken by the shipments in question.

Prior to the institution of this proceeding in the District Court the Delmar Company brought a proceeding before the Interstate Commerce Commission to obtain reparation on these shipments. The Commission in its report (*Delmar Company v. Great Northern Railway Company*, 120 I. C. C. 530) held, with Commissioner Taylor dissenting, that the route from the country station through Minneapolis to Superior was "an open route" and in the absence of restricted routing in the tariff it must be found that the through rates to Superior applied via Minneapolis. At the trial in the District Court the Delmar Company offered no evidence other than the Commission's report and order.

The trial court stated in its opinion that common sense would seem to indicate that these rates applied only via the natural and direct routes and did not extend to shippers the privilege of using a longer and more circuitous route, but that it did not feel warranted in disturbing the Commission's construction (Rec. pp. 12-14). Upon appeal the judgment was affirmed by the United States Circuit Court of Appeals for the Eighth Circuit. The Circuit Court of Appeals held (1) that the Interstate Commerce Commission had adopted and repeatedly announced a rule of construction that where there was more than one route from a point of origin to destination a rate between those points applied to a shipment over any one of those routes unless that route was unreasonably circuitous or unless the carrier had expressly limited the rate in the tariff

to a particular route designated therein; (2) that this was a departmental ruling or construction which the court should accept unless plainly wrong, and that in this case the Commission's ruling impressed the court as being essentially sound; and (3) that the Commission had determined that the routes through Minneapolis in connection with the shipments in question were not unreasonably circuitous, and that this finding was supported by substantial evidence and should not be disturbed by the court.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

(1) Possible constructions of such a tariff as is before the Court in this proceeding are:

(a) That the rate applies over any route the shipper may specify, no matter how circuitous, *e. g.*, over a route 500 miles in length when there is a direct route of 10 miles.

(b) The construction of the Commission adopted by the lower court that the rate applies over any routes which are not unreasonably circuitous, making it an administrative question for the Commission in each instance to determine whether a given route is unreasonably circuitous or not. This construction is erroneous as a matter of law. Among other things it results in leaving a shipper and the carrier in a state of uncertainty as to what the Commission might find after a long delay as to the reasonableness of any given route, and makes it impossible for a shipper before he makes his shipment to determine from the tariff what route is open to him on the rate named.

(c) The construction contended for by petitioner that the rate applies only via the direct route. This construction is a

natural and common sense one and enables a shipper before he makes his shipment to determine definitely the route to which the rate applies by examining a map and the carrier's mileage tables in the tariff.

The construction which should be placed upon tariffs like the one in question has never been determined by the Supreme Court. It is important to all railroads and shippers in the United States and does not involve merely the small sum sued for in this proceeding. Other similar cases are pending before the courts and the Interstate Commerce Commission, both on its formal and informal dockets, the disposition of which would be governed by the case at bar. The question arises constantly and has long been a troublesome one. We believe that it is an important question of federal law affecting the Commission's administration of the Interstate Commerce Act and the rights of interstate shippers and carriers generally.

Since the Circuit Court of Appeals rendered its decision in this proceeding the Interstate Commerce Commission on October 14, 1930, issued its report in I. C. C. Docket No. 20,458, *Washburn Crosby Co. v. Great Northern Railway Co., et al.*, ... I. C. C. ...., involving identically the same question in connection with shipments of wheat from Minnesota, North Dakota, South Dakota and Montana to Superior, Wis., moving via the lines of petitioner and also the Northern Pacific Railway Company. The Commission followed its holding in the *Delmar case* but Commissioners Farrell and Lee dissent. Commissioner Brainerd concurs specially, saying that it seems reasonable to conclude that the rates from the country stations to Superior do not apply via the circuitous routes through Minneapolis but that the Commission so held in the *Delmar case*, which was upheld by the Federal courts, and that therefore he concurs in the conclusions of the majority. We have

the curious situation of the trial court in this proceeding (Delmar case) agreeing with the position of the petitioner but deferring to the Commission's views, and of a member of the Interstate Commerce Commission in a subsequent case agreeing with the views of petitioner but feeling himself under constraint because of the decision of the trial court in this proceeding.

(2) The Circuit Court of Appeals considered the Interstate Commerce Commission's rule of construction of tariffs as a "departmental ruling or construction" which the court should accept unless "plainly wrong." The court erred in this. The Commission's rule was not one promulgated by the Commission in its administrative capacity for future observance by carriers in preparing tariffs. It was merely the Commission's view of the *law* governing the interpretation of tariffs and was announced by the Commission in various cases pending before it to obtain reparation where the Commission acted in its semi-judicial capacity of determining the rights of private parties in connection with past shipments. The Supreme Court has held in *Great Northern Ry. Co. v. Merchants Elevator Co.*, 259 U. S. 285, that the question of what interpretation shall be placed on a railroad tariff is ordinarily one of law for the court.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding that court to certify and to send to this court for its review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 8821, *Great Northern Railway Company, Appellant, vs. Delmar Company, Appellee*, and that

said decree of the Circuit Court of Appeals of the United States for the Eighth Circuit may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

GREAT NORTHERN RAILWAY COMPANY,
By F. G. DORETY,
R. J. HAGMAN,
Counsel for Petitioner

IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

GREAT NORTHERN RAILWAY COMPANY,

Petitioner,

vs.

DELMAR COMPANY,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

THE OPINIONS OF THE COURTS BELOW.

The opinion in the District Court of the United States for the District of Minnesota, Fourth Division, is reported in *Delmar Co. v. Great Northern Ry. Co.*, 34 Fed. (2nd) 221, and is found at page 10 of the Record.

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit, dated September 16, 1930, has not been officially reported to this date but is found at page 84 of the Record.

II.

JURISDICTION.

The judgment of the Circuit Court of Appeals for the Eighth Circuit was entered on September 16, 1930 (Rec. p. 87), less than three months prior to the date of application for this writ of certiorari (U. S. Code, Title 28, Sec. 350).

The jurisdiction of the Supreme Court is invoked under paragraph (a) of Section 240 of the Judicial Code, as amended and re-enacted by the Act of February 13, 1925 (U. S. Code, Title 28, Sec. 247).

III.

STATEMENT OF THE CASE.

A statement of the case has been given in the petition under the heading "Summary Statement of the Matter Involved."

IV.

SPECIFICATION OF ERRORS.

1. The Circuit Court of Appeals erred in finding and holding that the tariff in question should be construed as making the rates applicable to the circuitous routes through Minneapolis (Petitioner's motion for findings and judgment in its favor upon the sole and only ground that the evidence would support no other conclusion was denied by the trial court and exception allowed, Rec. p. 45).

2. The Circuit Court of Appeals erred in finding and holding that the Commission's rule of construction is a departmental ruling or construction which the court should accept unless plainly wrong.

3. The Circuit Court of Appeals erred in entering judgment against petitioner, except in connection with the shipments from Litchfield and Rogers, Minn., where the direct routes were through Minneapolis.

V.

ARGUMENT.

A.

STATUTE GOVERNING ACTIONS TO RECOVER REPARATION.

Where reparation ordered by the Interstate Commerce Commission is not paid the Interstate Commerce Act provides that the shipper may commence a proceeding in the Federal Court to recover his damages, which proceeding shall proceed in all respects like other civil suits for damages, except that on the trial the findings of the Commission shall be *prima facie* evidence of the facts therein stated (U. S. Code, Title 49, Sec. 16). It is only as to the *facts* contained in the Commission's report and order that they are made *prima facie* evidence in a proceeding before the court. *Lehigh Valley R. Co. v. Clark*, 207 Fed. 717, 728. The case is before the court *de novo*. *Montrose Oil Refining Co. v. St. Louis-San Francisco R. Co.*, 25 Fed. (2nd) 750, 754.

B.

PRINCIPLES OF LAW GOVERNING INTERPRETATION OF TARIFFS.

In *Great Northern Ry. Co. v. Merchants Elevator Co.*, *supra*, this court discussed the principles of law governing the interpretation of railroad tariffs, saying at pages 290 to 292:

"It is true that uniformity is the paramount purpose of the Commerce Act. But it is not true that uniformity in construction of a tariff can be attained only through a preliminary resort to the Commission to settle the construction in dispute. Every question of the construction of a tariff is deemed a question of law; and where the question concerns an interstate tariff it is one of federal law. If the parties properly preserve their rights, a construction given by any court, whether it be federal or state, may ultimately be reviewed by this court either on writ of error or on writ of certiorari; and thereby uniformity in construction may be secured. Hence, the attainment of uniformity does not require that in every case where the construction of a tariff is in dispute, there shall be a preliminary resort to the Commission.

* * * * *

But what construction shall be given to a railroad tariff presents ordinarily a question of law which does not differ in character from those presented when the construction of any other document is in dispute.

When the words of a written instrument are used in their ordinary meaning, their construction presents a question solely of law. But words are used sometimes in a peculiar meaning. Then extrinsic evidence may be necessary to determine the meaning of words appearing in the document. This is true where technical words or phrases not commonly understood are employed. Or extrinsic evidence may be necessary to establish a usage of trade or locality which attaches provisions not expressed in the language of the instrument. Where such a situation arises, and the peculiar meaning of words, or the existence of a usage, is proved by evidence, the function of construction is necessarily preceded by the determination of the matter of fact." (Italics ours).

C.

THE TARIFF SHOULD, AS A MATTER OF LAW, BE CONSTRUED AS MAKING THE RATES FROM THE COUNTRY STATIONS TO SUPERIOR APPLICABLE ONLY VIA THE DIRECT ROUTES.

We desire first to discuss the proper interpretation of the tariff without regard to the construction placed thereon by the Commission.

The Natural and Common-Sense Construction.

A typical page of the tariff which the Court is called upon to construe is page 43, which is reproduced as page 77 of the Record (Rec. p. 81). For example, that page shows a rate on wheat from Howes, N. D., to Superior, Wis., of 17½¢ per cwt. It will be noted that the tariff is silent as to the route over which that rate applies. The Delmar Company's shipment moved from Howes to Superior via the circuitous route through Minneapolis, a distance of 406 miles. The direct route from Howes to Superior is via Vance, Fargo, Sauk Center, St. Cloud and Milaca, a distance of 331.3 miles. The distance via the circuitous route through Minneapolis is 75.7 miles or 23% greater than the distance via the direct route (Rec. pp. 25, 26, 55, 71).

When a transportation company offers to transport a shipment between A and B for 17½¢ per cwt. and nothing is said as to the route over which the shipment will be carried, the common-sense and natural construction is that the offer is to transport the shipment over the direct route. There is no warrant for presuming that it is a matter of indifference to the carrier whether or not it incurs the additional expense of hauling the shipment an unnecessary distance of 75.7 miles. Not

only is the route through Minneapolis much longer but it requires the shipment to be handled through the large terminals of Minneapolis instead of through country junctions. The Interstate Commerce Commission found "Certain traffic difficulties and delays are encountered in moving traffic through the Minneapolis terminals that are not encountered over the short route." (Rec. p. 57).

There is no basis in reason for reading into the tariff an obligation on the part of petitioner which is not expressed in the tariff and which would require petitioner to give a much more expensive service than it would give over the direct and natural route between Howes and Superior. The more natural and reasonable view would be that if the intention had been to give the shipper the right to require petitioner to haul the shipment "all around Robin Hood's barn", the tariff would have expressly given that right and would not have left it to implication. In *Reynolds v. Stockman*, 75 S. E. 341, 342, the court said:

> "Now, while it is true that an obligation may sometimes be implied from the contract as a whole or from the circumstances, and where the implication is necessary or is plain, it becomes as much a part of the contract as if it had been expressed; on the other hand, where it is not necessary to a fair and reasonable construction of the contract, or when it is not reasonably plain and clear that it was the intention of the parties, it ought not to be made a part of the contract by construction, for thereby the court might write into the contract an obligation which the parties did not intend. The doctrine of implied obligation should be applied with caution; otherwise, the courts would impose obligations not intended by the parties. 6 R. C. L. 856, Sec. 244."

Custom.

It is undisputed that petitioner's practice was not to move grain from points west of St. Cloud and Willmar to Superior via Minneapolis (Rec. p. 44). The Interstate Commerce Commission in its report said "Previously it was the custom to apply the through rate only via the direct route, and to apply the proportional rate on shipments reconsigned at Minneapolis" (Rec. p. 57). Thus we find that the custom, as determined by the Commission, supports the construction that in the absence of a provision of the tariff as to routing the rates apply only via the direct route. In *Robinson v. U. S.*, 80 U. S. 363, 366, it was said:

> "If a person of a particular occupation in a certain place makes an agreement by virtue of which something is to be done in that place, and this is uniformly done in a certain way by persons of the same occupation in the same place, it is but reasonable to assume that the parties contracting about it, and specifying no manner of doing it different from the ordinary one, meant that the ordinary one and no other should be followed. Parties who contract on a subject-matter concerning which known usages prevail, by implication incorporate them into their agreements, if nothing is said to the contrary."

Petitioner's Construction Avoids an Unlawful Result.

If the tariff in question is construed as making the rates from the country stations to Superior applicable via the circuitous routes through Minneapolis it will result in this same tariff naming higher rates for shorter than for longer distances over the same rails in the same direction, in violation of the long-and-short-haul clause of the fourth section of the Interstate Commerce Act (U. S. Code, Title 49, Sec. 4). For example, the result would be that the tariff in question would name a

higher rate from Howes, N. D., to Cambridge, Minn., (a point intermediate between Howes and Superior via the circuitous route through Minneapolis) than from Howes to the more distant point of Superior, the two cars moving over the same rails in the same direction as far as Cambridge. The same situation exists as to other stations.

We were unable to make this point clear to the Circuit Court of Appeals, as appears from their discussion of it. However, it is a fact, as appears from the undisputed evidence (Rec. p. 30-33), and it was found to be a fact by the Interstate Commerce Commission for it made a finding on page 532 of its report that "Under complainant's interpretation there would be a violation of the long-and-short-haul clause of the fourth section of the Interstate Commerce Act" (Rec. p. 57).

If there is any doubt as to the meaning of a contract it is a well-established principle of law that a construction which would make the acts of the parties lawful should be adopted rather than a construction which would make their acts unlawful:

> "For it is a rule of interpretation that, where a contract is fairly open to two constructions, by one of which it would be lawful and the other unlawful, the former must be adopted."
>
> *Hobbs v. McLean*, 117 U. S. 567, 576.

> "Contracts are usually made with reference to the established law of the land, and should be so understood and construed, unless otherwise clearly indicated by the terms of the agreement."
>
> *Wilson v. Rousseau*, 45 U. S. 720, 764.

We believe the same principle should apply to a case of tariff construction. Under petitioner's construction its tariff would

not violate the long-and-short-haul clause of the Interstate Commerce Act.

The Interstate Commerce Act Precludes the Construction Placed on the Tariff by the Circuit Court of Appeals.

Paragraph (1) of Section 6 of the Interstate Commerce Act (U. S. Code, Title 49, Sec. 6) requires common carriers to file with the Commission and publish tariffs showing their charges "for *transportation* between different points" on their lines, which tariffs

> "shall *also* state *separately* * * * *all privileges or facilities* granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper or consignee." (Italics ours.)

Paragraph (7) of the same section forbids any carrier to "extend to any shipper or person any *privileges or facilities* in the transportation of passengers or property, *except such as are specified in such tariffs*" (Italics ours).

The "privileges or facilities" referred to obviously are services or benefits to the shipper *over and above* the ordinary, usual and necessary services rendered in "transportation between different points." If this were not so the statute would not add to the requirement that the tariff shall show the charges for "transportation between different points" the specific requirement that the tariff shall also state separately all privileges or facilities granted or allowed.

The following have been held to be privileges or facilities which a carrier may not lawfully extend to a shipper in connection with transportation unless such privileges or facilities are expressly provided for in the tariffs:

(a) Reconsigning a shipment to a more distant point after it has arrived at the billed destination, and charging the rate applicable to a shipment originally billed from the origin point to the final destination (*Kerns & Sons v. C. M. & St. P. Ry.*, 40 I. C. C 552, 554).

(b) Transit—stopping a shipment en route to final destination for the purpose of storing, milling, fabricating, compressing or otherwise treating it, and charging the rate applicable to a shipment moving directly from the origin point to final destination (*Armour & Co. v. D. L. & W. R. R.*, 101 I. C. C. 337, 339; *Fohner & Co. v. G. N. Ry. Co.*, 15 I. C. C. 33, 36).

(c) Stopping a shipment while en route to permit partial loading or unloading. (*Mississippi Pearl Button Co. v. A. T. & S. F. Ry. Co.*, 98 I. C. C. 560, 563).

(d) Furnishing artificial heat to prevent freezing while a perishable shipment is en route. (*McGovern v. Ann Arbor R. Co.*, 162 N. W. 668; *Clemons Produce Co. v. D. & R. G. R. R.*, 219 S. W. 660).

(e) Placing a perishable shipment in a roundhouse en route to prevent freezing, or expediting the shipment by attaching it to a passenger train (*Dolan Fruit Co. v. Davis*, 196 N. W. 168).

If the shipper had merely wanted "transportation" between Howes, N. D., and Superior, Wis., for example, he would have been satisfied to have had the shipment move from Howes to Superior over the direct route. He would have had no interest beyond having the shipment delivered safely and expeditiously at Superior. But when he wanted the shipment to pass through the primary grain market of Minneapolis, which was on a circuitous and less expeditious route, it must be assumed that he had an object in mind, for example, to try the market at Minneapolis. In this case the Delmar Company purchased the shipment and reconsigned it to Superior. Departing from

the usual and customary route between two points by hauling a shipment a roundabout way in order to pass through another primary market en route for the benefit of and at the request of the shipper is certainly a service *over and above* the ordinary, usual and necessary service incident to merely *transporting* a commodity between two points, and is as much a "privilege or facility granted or allowed" as are the various services enumerated above such as reconsignment, transit, etc.

The tariff nowhere states that the rates to Superior would apply over circuitous routes. If, in connection with the 17½¢ rate which the tariff named for transportation from Howes to Superior, petitioner had extended to a shipper the service of movement through Minneapolis over a circuitous and more expensive route it plainly would have violated section 6 of the Interstate Commerce Act by extending to a shipper a privilege or facility not specified in its tariff. In view of this fact it is clear that the tariff provision in question cannot be construed to permit the shipper to require the application of the rates to Superior to the route via Minneapolis.

The Commission's Interpretation.

Under the Commission's interpretation, which was approved by the Court, that where the tariff is silent as to the route over which the rates apply they apply over any routes which are not unreasonably circuitous, it is necessary in each case to have the administrative question of the reasonableness of any circuitous route determined by the Commission. That means that a shipper can never determine from the tariff itself whether the rate applies to any indirect route. He cannot determine this from the Commission before he makes his shipment. This interpretation of the tariff imports into it an uncertainty and

makes it impracticable. The interpretation contended for by petitioner that such tariffs should be construed as making the rate apply only over the direct route results in definiteness and certainty as the direct route can be ascertained by a map and an examination of the distance tables in the tariffs.

The interpretation of the Commission and court results in violations of the long-and-short-haul clause of the fourth section of the Interstate Commerce Act, violates the provision of the act regarding the extension to a shipper of special facilities or privileges not specified in the tariff, imports into the tariff an obligation not provided for in the tariff, disregards the previous custom in interpreting the tariff, and places an unnatural construction on the tariff.

While the greatest degree of circuity via Minneapolis of any shipments involved in this proceeding is 23%, the Commission in other cases has found not unreasonable circuitous routes through Minneapolis which are much more indirect. For example, in one of the six cases decided with the *Delmar case* (120 I. C. C. 530) the Commission found that since the tariff was silent as to the route over which the rates applied, the rate from Mentor, Minn., to Superior, Wis., applied via Minneapolis, although the additional distance via Minneapolis was 234 miles or 98% greater than over the direct route (Rec. pp. 35-36; Exhibit 7, Rec. p. 80). This illustrates to what extremes the Commission is carrying its construction of such tariffs.

Petitioner's arguments to support its construction of the tariff are not met by saying that railroads could insert in tariffs the various junctions via which the rates from each origin point to each destination point would apply, as petitioner did in connection with this particular tariff some time after these shipments moved in order to forestall further demands of this character. The question before the court is one

of law and the tariff in question should be construed as any other written document.

D.

THE CIRCUIT COURT OF APPEALS ERRED IN HOLDING THE COMMISSION'S CONSTRUCTION SHOULD BE FOLLOWED UNLESS PLAINLY WRONG.

An examination of the cases in which the Commission announced its construction of such tariffs, including the cases cited by the Circuit Court of Appeals, discloses that they are all cases in which a shipper sought reparation from a carrier in connection with past shipments on the ground that the carrier collected a rate in excess of the rate named by the tariff, in violation of Section 6 of the Interstate Commerce Act. Such proceedings under the Interstate Commerce Act may be brought either in the courts or before the Commission. When they are brought before the Commission the Commission acts in a "quasi-judicial capacity to measure injuries sustained by a private shipper." *Baer Bros. v. D. & R. G. R. R.*, 233 U. S. 479, 486. As the Commission was dealing with past shipments and with the rights of private parties it was called upon, as a court would be, to determine what the law is in order to determine whether or not the shipper has been damaged.

In the case of *Great Northern Railway Co. v. Merchants Elevator Co., supra*, the Supreme Court said that "every question of the construction of a tariff is deemed a question of law" for the court, and that preliminary resort to the Commission is necessary only when some administrative question is presented such as the peculiar meaning of words employed in a tariff in a technical sense, or when extrinsic evidence is necessary to establish a usage or custom. In this case the Commission

found that previously petitioner's custom was to apply the rates only via the direct route (Rec. p. 57) and no words were used which called for a construction from the Commission. The Commission in its quasi-judicial capacity merely stated what it considered to be the *law* in interpreting such tariffs. The following cases are illustrative of instances where the Supreme Court found that the Commission erred in construing the law and itself determined what the law was:

U. S. v. N. Y. C. R. R., 263 U. S. 603.
Top Line Cases, 234 U. S. 1.
Central R. R. of N. J. v. U. S., 257 U. S. 247.
Philadelphia & Reading Ry. v. U. S., 240 U. S. 334.
Ann Arbor R. R. Co. v. U. S., 281 U. S. 658.

The Circuit Court of Appeals considered the Commission's construction of the law as a "departmental ruling or construction" which the court should accept unless "plainly wrong." As the Commission's construction was merely its view of the law the court should itself have determined the law and should not have considered the Commission's construction as one it should follow unless "plainly wrong." The result is that the court was under constraint when it should not have been, and petitioner has not had the entire benefit of the court's free and independent determination of the law.

Section 6, paragraphs (3) and (6) of the Interstate Commerce Act empower the Commission to make "suitable rules and regulations for the simplification of schedules of rates, fares, charges and classifications" and to "determine and prescribe the form in which the schedules required by this section to be kept open to public inspection shall be prepared and arranged." The Commission in the exercise of its administrative functions probably could have made a ruling binding on

the carriers to the effect that on and after a certain date tariffs for transportation over a single line of railway shall specifically state via what junctions the rates apply and if no junctions are specified the rates shall be considered to apply via any route which the Commission does not consider unreasonably circuitous. But the Commission did not do this. It did not purport to prescribe any rule in this respect that the carriers were required to comply with in preparing their tariffs.

If the Commission had intended an administrative ruling which the carriers should comply with it would undoubtedly have included it in its Tariff Circular 18-A which contains the Commission's rules to be observed by carriers in preparing and filing their tariffs and indicates what matter shall be included in tariffs and how it shall be arranged. If the Commission's rule had been included in its Tariff Circular 18-A the carriers would have had notice of it and would have been required to conform thereto in preparing the tariff in question. Certainly the Commission did not intend to promulgate a rule to be observed by all carriers under its jurisdiction simply by stating in an opinion in a controversy between private parties what it considered the law to be with respect to the interpretation of tariffs already issued.

CONCLUSION.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this court of its supervisory powers in order that the errors committed by the Circuit Court of Appeals may be corrected, and that to such end a writ of certiorari should be granted by this court and this court should

review the decision of the Circuit Court of Appeals and finally reverse it.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1930.

No. 563

GREAT NORTHERN RAILWAY COMPANY,

Petitioner,

vs.

DELMAR COMPANY,

Respondent.

STATEMENT OF RESPONDENT OPPOSING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE EIGHTH CIRCUIT.

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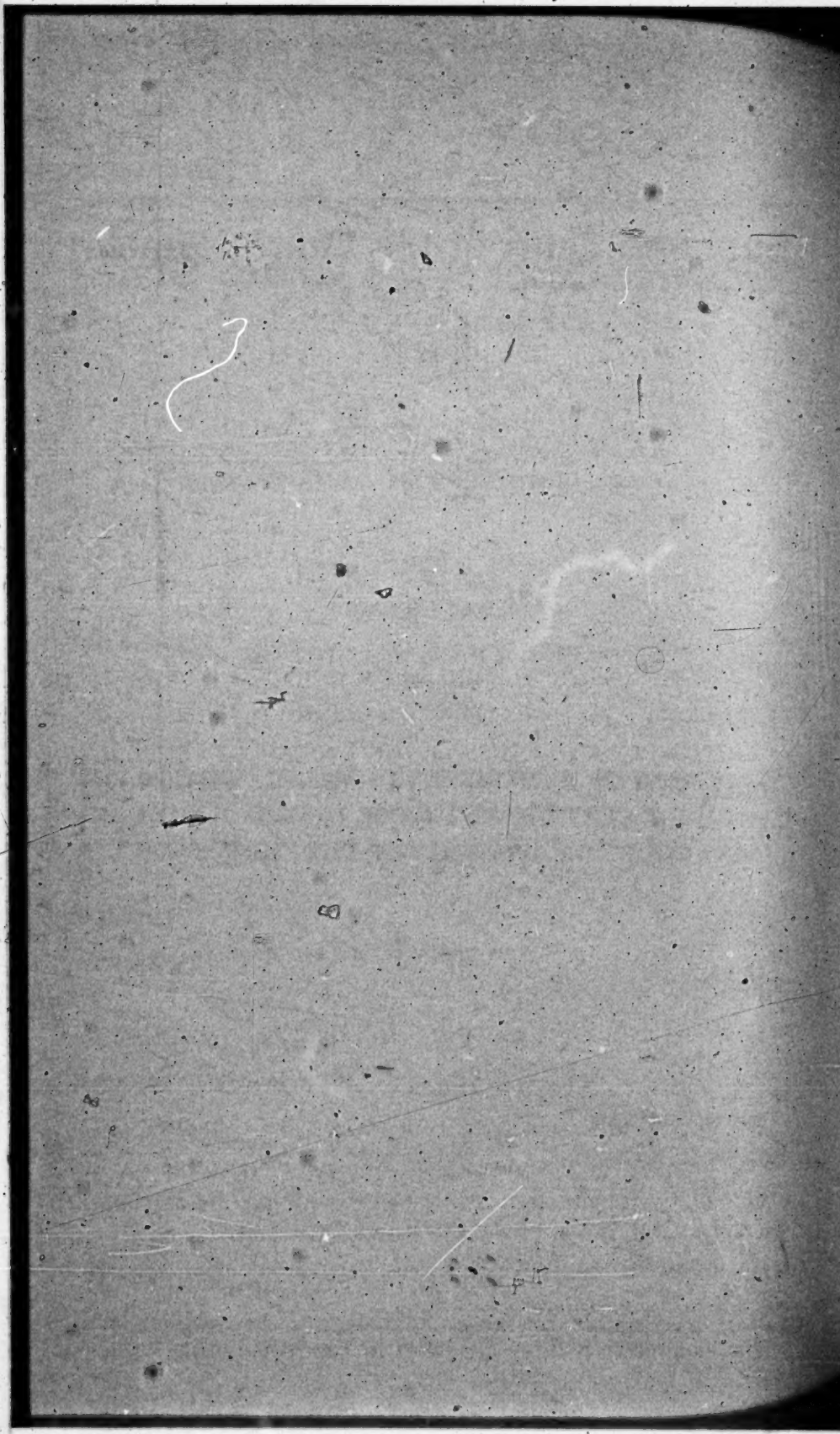

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Respondent, contending against the claim of Petitioner that this Court should issue its Writ of Certiorari as petitioned, respectfully shows as follows:

STATEMENT OF CASE.

The tariffs filed with the Interstate Commerce Commission, which are herein questioned, did not restrict the application of the rates therein published to any particular route. The shipments involved in this proceeding were shipped via Minneapolis to Superior, Wisconsin, while the shortest route was via Willmar, Minnesota.

The Commission in its decision in this proceeding, which

is reported in 120 I. C. C. 533 (R. 57), found as follows:

> "The route from points of origin herein through Minneapolis to Superior was an open route, and in the absence of restricted routing it must be found that the through rates to Duluth applied over the route traversed."

The Trial Court in its findings interpreted this statement of the Commission in 34 Federal (2d) 221, as follows:

> "In the case of *Delmar Co. vs. G. N. Ry. Co., supra,* they refer to the route over which the shipments in question moved as being an 'open route.' Apparently by this they meant that it was an unrestricted and available route and not unduly circuitous. That would seem necessarily to follow from the conclusion which they arrived at."

The United States Circuit Court of Appeals in its decision found in 43 Federal Reporter (2d) 780, page "782":

> "The Commission is supported by substantial evidence in its determination of the facts in this case" (R. 84-87).

It is the contention of the respondent that in the interpretation of these tariffs, there was the question before the Commission—by what route would the rates apply? And the Commission determined this question based upon the facts before it that there were no restrictions and that the route traversed was an "open route"—meaning that it was reasonable. There is nothing in these decisions which shows any arbitrary action on the part of the Interstate Commerce Commission or that they have exceeded the legitimate bounds of their authority.

The rule as to what matters should be reviewed by this

Court has been well established by its decisions. In *Seaboard Air Line Railway Company, et al., vs. United States, et al.*, 254 U. S. 57, 62, the Court says:

> "Moreover the determination of questions of fact is by law imposed upon the Commission, a body created by statute for the consideration of this and like matters. The findings of fact by the Commission upon such questions can be disturbed by judicial decree only in cases where their action is arbitrary or transcends the legitimate bounds of their authority."

We respectfully submit to the Court that the Appellant has not shown that the matter to be reviewed comes within any well defined principle established by this Court for the reviewing of orders of the Interstate Commerce Commission or Federal Court decisions. There is no such public interest or conflict of decisions of lower Courts or Commissions that necessitates a supervision of said Courts or Commissions, nor is there any claim by the petitioner that the action of the Interstate Commerce Commission was arbitrary or that they had exceeded the legitimate field of their activities. The interpretation of tariffs is ordinarily the duty of the Interstate Commerce Commission.

Respectfully submitted,

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RESPONDENT'S BRIEF.

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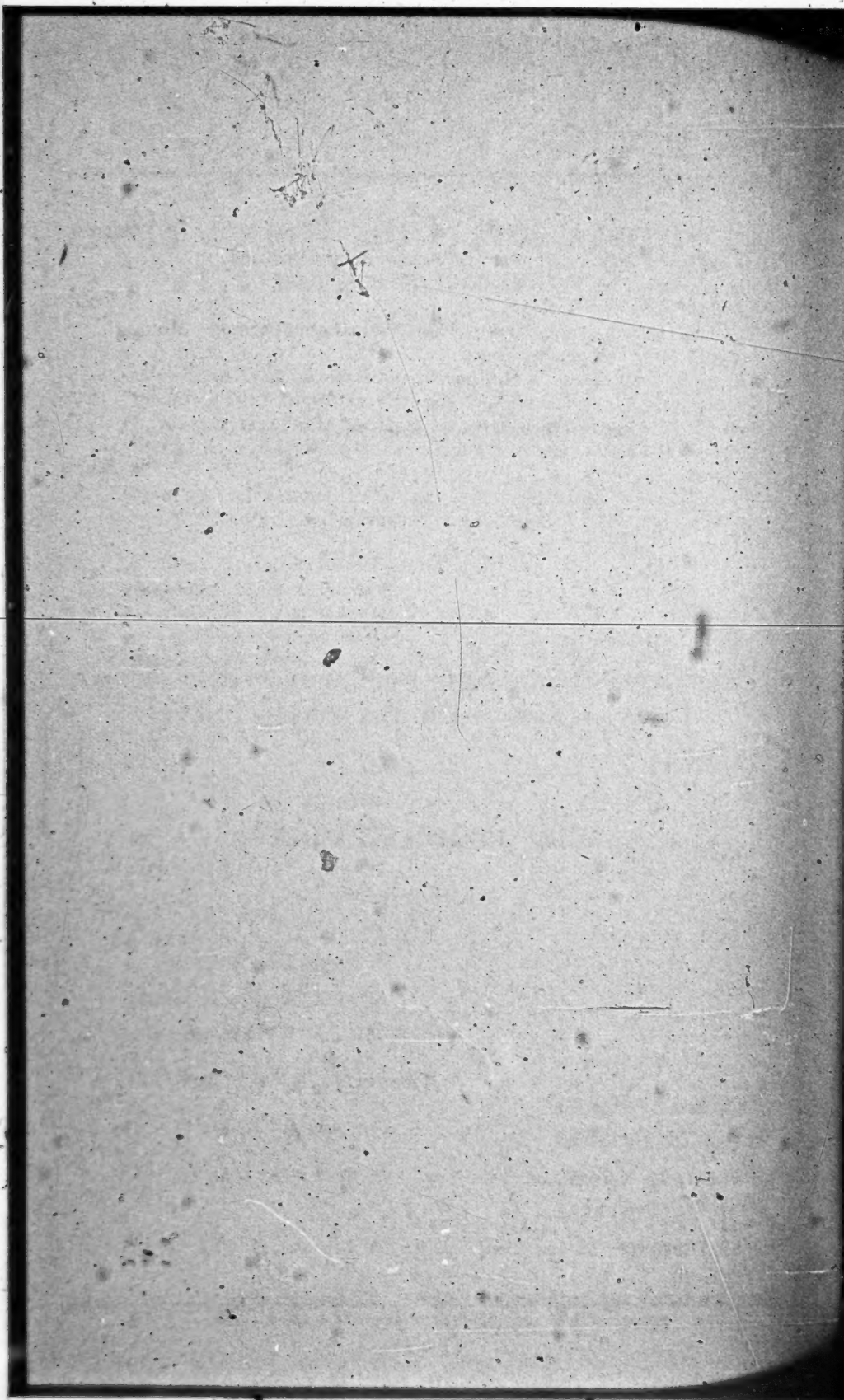

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Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

RESPONDENT'S BRIEF.

STATEMENT OF FACTS IN SUPPORT OF RESPONDENT'S POSITION.

The Delmar Company (a corporation) filed on December 4, 1924, with the Interstate Commerce Commission, its complaint (R. 60) asking for a finding that on certain shipments of grain from points of origin in North Dakota, South Dakota and Minnesota to Superior, Wisconsin, the Great Northern Railway Company made certain overcharges and to fix the amounts thereof. The Commission issued its order, dated March 20, 1926, finding that overcharges had been made, and by supplemental order dated October 10,

1927, the Commission issued its further order requiring the Great Northern Railway Company to pay to the Delmar Company the sum of Six Hundred Forty-eight and Eighty-four Hundredths Dollars ($648.84), with interest. The Great Northern Railway Company declined to pay said sum, and this proceeding was instituted to collect said sum of Six Hundred Forty-eight and Eighty-four Hundredths Dollars ($648.84) and interest.

The shipments were originally billed to Minneapolis, Minnesota, in every instance, and by virtue of authority of tariffs on file, the inbound bills of lading were surrendered and the grain re-shipped to Superior, Wisconsin, all in accordance to tariffs regularly published. The tariff covering shipments from points of origin to Superior, Wisconsin, contained no restrictions as to routes that the shipment would traverse. An examination of the map (R. 68) shows that there are several possible routes the shipment might traverse—the shortest route from points on the Aberdeen branch being via Tintah, Evansville, St. Cloud to Duluth, but the testimony of Mr. Beidelman (R. 24) shows the regular movement of this traffic billed to Superior is via Willmar.

We understand the contention of the Petitioner is that when they have published a tariff between two points where there are a number of possible routes, that without publishing a rule in the tariff, the Railroad Company can arbitrarily restrict the application to the particular route, which the carrier may, for any reason suitable to itself, in the secrets of its own organization, designate.

The Respondent contends, and the order of the Interstate Commerce Commission so holds in accordance with the Commission's well established practice, that if the carrier has not exercised its privilege to restrict the route in its tariff, that the rate is available by any "open" route.

The Interstate Commerce Commission found, as an ultimate fact, that the rate via Minneapolis was an "open" route (120 I. C. C. 530, 533) (R. 55), and the Trial Court, in interpreting appellant's tariff, sustained the Commission's finding (34 Fed. (2nd) 221, 222), which latter decision was affirmed by the Circuit Court of Appeals for the Eighth Circuit (43 Fed. (2nd) 780).

The Respondent contends that the Commission's determination that the route traversed was an open route carries with it a finding of all necessary facts, such as available, workable and reasonable route, and that that finding of fact was within the scope of its administrative authority and should not be set aside.

ARGUMENT.

I.

Duty of Commission.

The Supreme Court in *Meeker & Company vs. Lehigh Valley Railroad,* 236 U. S. 412, 427, 428, states that the statute requiring the Interstate Commerce Commission to make findings of fact in its investigation means that the Commission shall find the ultimate facts, which, when applied to a particular case, would disclose:

(a) The relation of the parties as Shipper and Carrier in Interstate Commerce;

(b) The character and amount of traffic out of which the claims arise;

(c) The rates paid by the Shipper for the service and whether they are according to the established tariff;

(d) Whether the rate collected was excessive and unreasonable, and if so, what would have been a reasonable rate for the service; and

(e) If the rate was excessive and unreasonable, the Shipper was injured thereby, and if so, the amount of damages sustained.

The Interstate Commerce Commission, in its report (120 I. C. C. 530), found:

"That complainants * * * made shipments over the Great Northern and paid and bore the charges thereon; that they were damaged thereby in the amount of the difference between the charges paid and those which would have accrued at the applicable rate; and that they are entitled to reparation, with interest" (R. 59).

and—

"The route from points of origin herein through Minneapolis to Superior was an open route, and in the absence of restricted routing it must be found that the through rates to Duluth applied over the route traversed" (R. 55).

II.

The Commission Found That the Route Through Minneapolis Was an Open Route.

The Petitioner would have the Court believe that Respondent's contention is that the published tariff should apply over any route the shipper may designate, no matter how circuitous, because the tariff did not expressly restrict the application of the rate to the direct route. The Respondent makes no such contention, but the Commission has found that the tariff was silent as to the routes over which the rates would apply, and that the route actually traversed was an open route, necessarily inferring from such finding that it would not be unreasonable to interpret the through rates as applying to that particular route. The Commission had

before it all the evidence with reference to the route traversed, and after due consideration must have believed that the route via Minneapolis, as well as being available and workable, was reasonable under the circumstances, or it would not have made the finding that it was an "open route."

III.

The Commission's Ruling, in the Case at Bar, Follows its Long and Well Established Practice of Tariff Interpretation.

The Commission cited in its report *Pioneer Lumber Company vs. Director General*, 74 I. C. C. 288, 289 (R. 55), respecting shipments from Puget Sound via Minneapolis to Superior—

> "At the time of movement the rates to Minnesota Transfer also applied to Duluth via the 'Northern Pacific Railway,' but defendants argue that they applied only by way of the direct route through Staples and Brainerd, Minnesota, and not over the route of movement, which is 146 miles longer. *There was nothing in the governing tariffs which restricted the application of the rates to a particular line of the Northern Pacific. The route through Minnesota Transfer is workable* and in the past the Northern Pacific tariffs have specifically provided for the application of the Duluth rates through that point. In the absence of a restricted routing, it must be held that the rates to Duluth applied over the route of movement."

In the above case the movements, as in the case at bar, were made entirely over the rails of one carrier. The Commission found that the route through the Minnesota Trans-

fer was a workable route *(which we interpret to mean a reasonable route)*, and that fact, together with the lack of any specific routing being named in the tariff, forms the basis of its order for reparation.

The Commission in *Mason Brothers vs. Southern Pacific Company, et al.*, 28 I. C. C. 402, 405, held—that shipments originating at Lodi, California, and consigned to Minneapolis, subsequently reconsigned to New York, should take the through rate to New York. Also the most direct route would have been through Omaha direct to Chicago and then on to New York. The circuitous out of line movement via Minneapolis made the haul about 265 miles greater than by the direct route. Although the rate published was a joint through rate the Commission said:

> "We find no tariff authority for application of the joint through rate plus the rate of 18c from Minneapolis to Chicago."

The tariff under which these shipments were made designated no routes east of Ogden or Salt Lake City, Utah. It is reasonable to infer therefrom that the Commission deemed the route of movement, a reasonable open route.

Combination rates were charged the shipper in *Van Dusen Harrington Co. vs. Chicago, Mpls. & St. Paul Ry. Co.*, 47 I. C. C. 59, in which case shipments originating at points in Iowa and Nebraska consigned to Minneapolis were reshipped to various points in California. The joint rate published was 55c for shipments from origin points to final destination. Combination rates of 66.5c, composed of rates of 11.5c to Minneapolis and 55c beyond, were paid. The Commission in awarding reparation stated:

> "There was nothing in the tariff naming the 55c rate that would have precluded complainant from routing

the shipments through Minneapolis had they been billed through to the California points in the first instance. If it was defendant's purpose to restrict the application of the joint rate to any particular route and the reconsigning privileges authorized in connection therewith to any particular point, it should have been done by clear and unequivocal language" (47 I. C. C. 59, 61).

The route of movement was undoubtedly found by the Commission to be a reasonable one.

In *Western Cement Rates*, 132 I. C. C. 273, the question of the reasonableness of the applicable routes was taken up and discussed at length. The Commission applied the reasonableness construction in the *Atwood Davis Sand Co. vs. C. & N. W. Ry. Co.*, 136 I. C. C. 471, 475, when it said:

> "All of these routes are over the lines of a single carrier in the general direction of the destinations to which specific rates were named, and the distances over such routes to those destinations exceed the corresponding distances over the routes by only a few miles. To construe the governing tariffs in the absence of any routing restriction, as providing for the application of the specific rates over all of these routes, can not be said to be a strained and unnatural construction."

And the Commission cites *Richardson Sand Co. vs. Director General*, 89 I. C. C. 555, as supporting this last contention. Respondent here contends that the governing tariff was the published tariff for shipments moving from origin points to Superior, regardless of the fact that shipments were first consigned to Minneapolis and later reconsigned to Superior. The fact that the Minneapolis route was an open route is what we believe to be the controlling factor. Fol-

lowing are some cases where the open route principle has been applied:

Van Dusen Harrington Co. vs. C. M. & St. P. Ry. Co., 35 I. C. C. 172.

Meeds Lumber Co. vs. Director General, 59 I. C. C. 243.

Freeman Grain Co. vs. Director General, 68 I. C. C. 559.

Pioneer Lumber Co., et al., vs. Director General, & N. P. Ry. Co.; 74 I. C. C. 288.

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Richardson Sand Co. vs. Director General & C. & N. W. Ry. Co., 89 I. C. C. 555.

Scott County Farm Bureau vs. A. & V. Ry. Co., 101 I. C. C. 357.

Browne-Hinton Wholesale Grocery Co. vs. Gt. Nor. Ry., 102 I. C. C. 237.

Delmar Co. vs. Gt. Northern Ry. Co., 120 I. C. C. 530.

Northwestern Fruit Exchange vs. Gt. Northern Ry. Co., 128 I. C. C. 538.

It is not necessary for us to contend that where the tariffs have not restricted the routing but shippers have attempted to apply the rates over routes which were circuitous, that in every instance the rate would apply. The finding of fact that the route via Minneapolis was an open route, eliminates the question of fact as to whether the route traversed was unreasonably circuitous.

The Commission held in 68 I. C. C. 559, *Freeman Grain Company vs. Director General, as Agent*, that shipments being made over rails of two carriers, where joint rates were published but no routes designated, were subject to the rates

applicable over direct routes, although the actual movements were circuitous.

They said:

> "The rate was not restricted in its application to any particular route. * * * It is contended for Defendant the 64c joint rate was not applicable under the inspection and reconsigning rules referred to for the reason that Salina is not 'directly intermediate' from Lucas to the points of ultimate destination, the distances by way of Salina being 78 miles greater than those over the branch line through Colby. * * * It is not disputed that normally traffic from Lucas to Western points moves through Colby. * * * However, there was nothing in the tariff naming the joint rate which would have precluded complainant from routing the shipments through Salina had they been billed direct from Lucas to California points."

Here the Commission evidently held that the through rate should apply *solely* because the tariff did not restrict the routing. We do not base our contention (as stated above) on this fact alone, but on the reasonableness of the route as can be inferred from the Commission's finding.

Petitioner, through its traffic witness, Beidelman, testified (R. 34) that under Respondent's interpretation, utterly absurd results would follow by reason of an illustration given of the distance between Granville, North Dakota, and Genoa, North Dakota, to be 21 miles over the shortest route, and a distance of 1,100 miles between the same points by way of Boylston, Wisconsin.

The Commission has not found that the last mentioned route is an open or reasonable route, nor did it have any such question before it for determination. The Commission

in the Delmar case, found that the route traversed was an open route, which must have included a reasonable, available, practical route.

As shown by the table of distances on page "531" of the Commission's Report (R. 53), the maximum of circuity of any of the shipments is 23%. The Commission has repeatedly held that such circuity is reasonable, and in the case of *Western Cement Rates*, 132 I. C. C. 273, where distances were prescribed, carriers were permitted to meet the rate of the shorter line for distances up to 150 miles, if the circuity was not over 70%. If custom determines interpretation of tariffs, it appears that the decisions of the Interstate Commerce Commission commencing with the case of *Van Dusen Harrington Co. vs. C. M. & St. P. Ry. Co. (supra)*, decided in 1917 and cases following, greatly outweight the Railroad Company's claimed practice.

IV.

The Commission's Interpretation of the Tariff Cannot Be Construed a Violation of Paragraph (7), Section 6, Interstate Commerce Act.

Petitioner contends in its brief (pp. 16-18) that to apply the direct through rate would be to allow respondent a privilege in conflict with paragraph (7), Section (6) of the Interstate Commerce Act (49 U. S. C. A., Sec. 6) forbidding such privileges.

We have not been able to find any reference made by the Commission in the numerous cases cited above to the effect that their holding that rates applying over reasonably circuitous routes, allowed any special privileges or facilities. We contend that a movement over an open and reasonable

route is not a privilege or facility within the meaning of the Act. *Kerns & Sons vs. C. M. & St. P. Ry.*, 40 I. C. C. 552, 554, as cited by Petitioner on page "17" of its brief, is not applicable to our case. In that case the Commission said:

> "But the 17.5c rate applicable on this basis was not applicable to the complainant's shipment, for the reason that defendant's tariffs made no provision for reconsignment. * * * The defendant stated in its answer that the diversion of complainant's shipment would have been effected, and 'without requiring extra service,' if defendant's agent at Dayton had sought the advice of the proper officials promptly" (p. 553).

The Petitioner has not questioned the right of Respondent to reconsign the shipments from Minneapolis to Superior and the Commission found that complainant (Respondent) admittedly complied with the requirements of the applicable reconsigning rules (120 I. C. C. 530, 531—R., p. 56). We contend, therefore, that any reference to any unlawful privilege being granted is inapplicable, for that particular point is not in issue. The other cases referred to (Petitioner's Brief, p. 17) as privilege cases have no bearing whatsoever on our case.

V.

A Tariff Published Under Rules of Interstate Commerce Commission Is in Effect the Law Governing Shipments Thereunder.

In *Pillsbury Flour Mills Co. vs. G. N. Ry. Co.*, 25 Fed. (2nd) 66, 68, the Court says:

> "The Tariff, so long as it is of force, is in respect,

of rates named, to be treated as though it were a statute, binding as such upon the railroad and shipper alike."

In this and the Court's statement in *G. N. Ry. Co. vs. Merchants Elevator Co.*, 259 U. S. 285, 290 (Petitioner's Brief, page 11)—"Every question of the construction of a tariff is deemed a question of law," we concur. But we do not concur in the Petitioner's contention that it should be their privilege to interpret the tariff (conceded to be statutory law) in their own manner. A tariff filed with the Interstate Commerce Commission, being the creature of the Railroad Company, should be interpreted strongest against the Company if the usual rules of construction of documents and contracts are followed.

We have in our case the established facts that there were several available open routes over which the shipments could move—one of the routes is claimed by Petitioner to be the usual route used over which Petitioner contends the through rate applies, and the other the route via Minneapolis actually traversed. Respondent contends that it should not be within the power of the carrier, where there is no designation of routing, to say that the rate shall apply only over that route which happens to be most direct, or most convenient to the carriers.

The purpose of the Interstate Commerce Act in prescribing published tariffs is so that all shippers may be cognizant of the rates, routes applicable, and other rules and regulations, and no shipper given any special privileges not allowed every other shipper. The right of the carrier to so designate the routes is its privilege. If it does not avail itself of that privilege to so restrict the rates to certain routes, then it does not have the right to restrict the rates to certain routes other than by filing published tariffs.

The Commission has interpreted the duty of the carrier in this respect in *Newton Gum Co. vs. C. B. & Q. R. R. Co., et al.,* 16 I. C. C. 341, 346—

"In their brief Defendants urge:

'We contend that uniform and long usage controls as to the interpretation of tariffs, just as a uniform construction put upon a contract by the parties thereto controls in the interpretation thereof.' * * * The law compels carriers to publish and post their schedules of charges upon the theory that they will be informative. A shipper who consults them has a right to rely upon their obvious meaning. He cannot be charged with a knowledge of the intention of the framers or the carrier's cannons of construction or some other tariff not even referred to in the one carrying the rate. The public posting of tariffs will be largely useless if the carrier's interpretation is to be dependent upon tradition and the arbitrary practices of general freight officers. This Commission has long since repudiated the suggestion that railroad officials may be looked to as authority for the construction of their tariffs. (See *Hulbert vs. L. S. & M. S. Ry. Co.,* 2 I. C. C., p. 122.) We quote from Judge Cooley's opinion in that case:

'A classification sheet is put before the public for its information. It is supposed to be expressed in plain terms so that the ordinary business man can understand it, and in connection with the rate sheet, can determine for himself what he can be lawfully charged for transportation. The committee who prepared this classification HAVE NO MORE AUTHORITY IN CONSTRUCTION THAN ANYBODY ELSE and they must leave the document, after they have given it to the public, to speak for itself.' Tariffs are to be construed according

to their language. The Commission can recognize no other criterion."

For further reference to the same contentions see the following:

Bon Marche vs. C. R. R. of N. J., et al., 21 I. C. C. 195, 196.

Pacific Coast Biscuit Co. vs. S. P. & S. Ry. Co., 20 I. C. C. 546, 549.

Sea Gull Specialty Co. vs. Baltimore S. P. Co., 27 I. C. C. 267.

Chas. Boldt Co. vs. P. C. C. & St. L. Ry. Co., et al., 42 I. C. C. 308.

Sea Board By-Product Coke Co. vs. Director Gen., 62 I. C. C. 317.

St. Tammany Ice & Mfg. Co., Ltd., vs. Director Gen., et al., 64 I. C. C. 491; and

I. & S. Docket 1786, Routing of Grain and Products, 81 I. C. C. 725.

Respondent's interpretation of the carriers being required by law to publish the rate is that it shall clearly indicate the route over which the published rate is applicable. When so published the rate named and the route designated stand as the law, binding as well upon the shippers as upon the carrier. A schedule of rates published in the manner provided by law speaks with equal authority to the shipper and to the carrier, and both are equally chargeable with notice of the rate and of the route over which the rate is made applicable. Where it fails to designate the route, the rate must fairly be interpreted to mean that it applies over all reasonable routes.

VI.

The Fourth Section of the Interstate Commerce Act Does Not Affect the Legal Right of the Parties to This Proceeding for the Reason That a Rate Published That Is a Violation of the Fourth Section Remains the Legal Rate Until Changed.

As we understand it, the Commission claims that the tariff as construed by it (120 I. C. C. 530) results in certain Fourth section violations over the longer route. Assuming this contention is correct, yet the Commission properly held that the published tariff rate was applicable, for this rate is binding upon both carrier and shipper although it may violate Section 4 of the Act.

The decision of Judge Bryan of the United States Circuit Court of Appeals for the Fifth Circuit in the case of *Beaumont, Sour Lake & Western Ry. Co. vs. Magnolia Provision Co.* (etc.), 26 Fed. (2nd) 72, which case was before this Court under Petition for Certiorari, and the same denied October 15, 1928, 278 U. S. 620, sets forth Respondent's position quite fully and we therefore quote him at length:

> "Appellants liken a published tariff rate to a contract between the carrier and the shipper in support of the argument that a mistake can be corrected so as to give effect to the intention of the parties. A shipper has no voice in the fixing of rates, but must pay the published rate, and can only make claim of reparation on account of a rate that is unjust or discriminatory. The Supreme Court has held that a published tariff rate is to be treated as though it were a statute binding upon both the carrier and the shipper. *Penn. R. R. Co. vs. International Coal Co.*, 230 U. S. 184, 33 S. Ct.

893, 57 L. Ed. 1446, Ann. Cas. 1915A, 315. Section 6 of the Interstate Commerce Act (49 U. S. C. A. Sec. 6; Comp. St. Sec. 8569) provides that a carrier shall not charge or receive any different compensation, whether greater or less, than that shown by the file and published schedule of rates. It is well settled by Supreme Court decisions that this provision of law must be strictly complied with because it is necessary to carry out the purpose of Congress to prevent unjust discrimination. *Gulf, Colorado & Santa Fe R. R. Co. vs. Hefley,* 158 U. S. 98, 15 S. Ct. 802, 39 L. Ed. 910; *New York, New Haven & Hartford R. Co. vs. Interstate Commerce Commission,* 200 U. S. 361, 26 S. Ct. 272, 50 L. Ed. 515; *T. & P. R. R. Co. vs. Mugg,* 202 U. S. 242, 26 S. Ct. 628, 50 L. Ed. 1011; *L. & N. R. R. Co. vs. Mottley,* 219 U. S. 467, 31 S. Ct. 265, 55 L. Ed. 297, 34 L. R. A. (N. S.) 671; *Keogh vs. Chicago & N. W. R. R. Co.,* 260 U. S. 156, 43 S. Ct. 47, 67 L. Ed. 183. In *Lamb-Fish Lumber Co. vs. Y. & M. V. R. R. Co.,* 42 I. C. C. 470, the Interstate Commerce Commission announces the rule that proof of error in the publication of rates does not justify a departure from the published rates, even though shippers have full knowledge that the rates were published by mistake, and that decision was cited with approval by the Supreme Court in *Davis vs. Portland Seed Co.,* 264 U. S. 403, 424, 44 S. Ct. 380, 68 L. Ed. 762. The carriers cannot defend by showing that published rates, if enforced, would violate the long and short haul clause and subject them to penalties. Such a showing would only be evidence of intention indicating that a mistake was made. Because of the policy of the law, the rate must be abided by as long as it is included in published schedules of rates. The remedy of the car-

riers is to apply to the Interstate Commerce Commission to have the rate changed."

In *Davis vs. Portland Seed Co.* (just above), this Court said:

"The record shows, we think, that the carrier violated the statute by publishing the lower rate for the longer haul without permission, and, prima facie, at least, incurred the penalties of Sec. 10. Also, it became 'liable to the person or persons injured thereby for the full amount of damages sustained in consequence of * * * such violation,' together with reasonable counsel fees, as provided by Sec. 8. But mere publication of the forbidden lower rate did not wholly efface the higher intermediate one from the schedule and substitute for all purposes the lower one, as a supplement might have done, without regard to the reasonableness or unreasonableness of either"; and that

"The statute requires rigid observance of the tariff, without regard to the inherent lawfulness of the rates specified."

In *Interstate Remedy Company vs. American Express Company,* 16 I. C. C. 436, 439, the Commission said:

"The question is not raised in this case as to the legality of such a rule and rate as here involved, and we do not pass thereon. But even if it should eventually be held that a carrier may not lawfully make a lower rate upon a returned shipment than would apply if it were an original shipment, we are of opinion that the carrier may not plead the unlawfulness of its tariff to avoid extending the benefit thereof to a shipper. While it has been repeatedly emphasized by the Commission that the shipper is put upon notice of the rate

by the publication of the tariff, it has not been held that a shipper must determine for himself the lawfulness of a rate, regulation, or practice, upon his peril. The responsibility rests upon the carrier to have lawful rates and rules in effect, and every shipper may with safety rely upon such rates without fear that they will be withdrawn as illegal after he has made shipment thereon, resting in the confidence that they are lawful so long as they are in force. If subsequently found to be unlawful, the carrier is subject to penalty for the institution and maintenance of such rates or rules, but the law does not contemplate that the shipper shall move upon any other theory than that the provisions of the carrier's tariff are in full compliance with the law's demands."

The error of the carrier in publishing a rate which violates the Fourth section or its failure to correct such error does not prevent application of the published tariff rate. Even if the language in the Circuit Court of Appeals' decision regarding the Fourth section were disapproved, that should not in any way affect the decision of this case.

VII.

Weight Given to Order of Interstate Commerce Commission.

Where the facts are undisputed, it is essentially one of the functions of the Interstate Commerce Commission to determine what is the correct order to make, and its conclusion is binding unless based on some mistake of law. In *Davis, Director General of Railroads vs. Prairie Pipe Line Co.*, 298 Fed. 393, the Court says:

"The question in the case is: What were the tariff rates applicable to these shipments?" (p. 394),

and on page 396,—

"Courts have given weight to the findings of the Interstate Commerce Commission as to questions properly before them. As to questions of fact, where there was ample evidence to sustain them, the Supreme Court of the United States has said the findings of the Commission thereon are conclusive."

(Louisville & Nashville Railroad Co. vs. United States, et al., 245 U. S. 463.)

In *United States of America vs. Louisville & Nashville Railroad Company,* 235 U. S. 314, the Court says:

"The very purpose for which the Commission was created was to bring into existence a body which from its peculiar character would be most fitted to primarily decide whether from facts, disputed or undisputed, in a given case preference or discrimination existed. *(East Tenn., etc., Ry. Co. vs. Interstate Commerce Commission,* 181 U. S. 1, 23-29.) And the amendments by which it came to pass that the findings of the Commission were made not merely *prima facie* but conclusively correct in case of judicial review * * * show the progressive evolution of the legislative purpose, etc." (p. 320).

The following case, although the Commission's order for reparation was based on the interpretation of a joint rate, we believe to express our contention that the order of the Commission should not be set aside: *Empire Refining Co. vs. Davis, Director General,* 6 Fed. (2nd) 305, 306,—

"In an action based on a reparation award made by

the Interstate Commerce Commission, covering an overcharge in freight rates based on a combination joint rate, the Commission had found that the Director General had overcharged on the shipment. In commenting on the Commission's decision, the court said: *The technical subject of tariff construction is one which ordinarily the Commission, because of its composition of members with special experience, knowledge, and training in that subject, is better able to correctly solve than the courts, and its decisions are a helpful guidance to the courts in arriving at correct conclusions in such matters.*"

In our case the rates in question apply only over the route of one carrier, but we see no reason for a different rate applying in such case than in the above. A large percentage of shipments that start out as local become joint before they reach destination under the privileges of the reconsigning tariffs, but the Commission has held as well that the rates should apply in the same manner where the line traversed is that of only one carrier.

(Pioneer Lumber Company vs. Director General, 74 I. C. C. 288, 289 *(supra).)*

In *Chicago, R. I. & P. Ry. Co. vs. United States,* 6 Fed. (2nd) 888, 889, 890, the Court said:

"The proceeding was quite within the jurisdiction of the Commission, and its carefulness and exhaustive investigation, and the completeness of the orders issued by it, preclude any thought of the arbitrary or unreasonable. If that be true the Courts have no power to interfere."

In *Seaboard Air Line Railway Company, et al., vs. United*

States, et al., 254 U. S. 57, 62, the Court makes the following statement:

> "Moreover the determination of questions of fact is by law imposed upon the Commission, a body created by statute for the consideration of this and like matters. The findings of fact by the Commission upon such questions can be disturbed by judicial decree only in cases where their action is arbitrary or transcends the legitimate bounds of their authority."

In *Manufacturers Railway Company and St. L. & S. W. Ry. Co. vs. United States and Interstate Commerce Commission*, 246 U. S. 457, 482, the Court remarked:

> "The conclusions were reached after full hearing, are not without support in the evidence, and we are unable to say that they show an abuse of discretion. It may be conceded that the evidence would have warranted a different finding * * * but *to annul the Commission's order on this ground would be to substitute the judgment of a court for the judgment of the Commission upon a matter purely administrative, and this cannot be done.*"

Following are a few cases where questions similar to ours have been presented to and decided upon by the Interstate Commerce Commission, and which will, we believe, aid the Court in determining how the orders of the Commission have been interpreted:

Interstate Commerce Commission vs. Union Pacific Railroad Company;

Same vs. Northern Pacific Railway Company;

Same vs. Great Northern Railway Company, 222 U. S. 541, 547,

in which the Court says:

"There has been no attempt to make an exhaustive statement of the principle involved, but in cases thus far decided, it has been settled that the orders of the Commission are final unless (1) beyond the power which it could constitutionally exercise, or (2) beyond its statutory power, or (3) based upon a mistake of law. * * * In determining these mixed questions of law and fact, the Court confines itself to the ultimate question as to whether the Commission acted within its power. *It will not consider the expediency or wisdom of the order, or whether, on like testimony, it would have made a similar ruling. The findings of the Commission are made by law prima facie true, and this Court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience. Ill. Central vs. I. C. C.*, 206 U. S. 441. Its conclusion, of course, is subject to review, but when supported by evidence is accepted as final; not that its decision, involving as it does so many and such vast public interests, can be supported by a mere scintilla of proof, but the courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order."

In *Proctor & Gamble Company vs. United States, et al.*, 225 U. S. 282, 297-298, the Court said:

"Originally the duty of the courts to determine whether an order of the Commission should or should not be enforced, carried with it the obligation to consider both the facts and the law. But it had come to pass prior to the passage of the act creating the Commerce Court that in considering the subject of orders of the Commission for the purpose of enforcing or restraining

their enforcement, the courts were confined by statutory operation to determine whether there had been violations of the constitution, a want of conformity to statutory authority, or of ascertaining whether power had been so arbitrarily exercised as virtually to transcend the authority conferred, although it may be not technically doing so."

And in *Pennsylvania Company vs. United States*, 236 U. S. 351, 361, the Court states:

"If the order made by the Commission does not contravene any constitutional limitation and is within the constitutional and statutory authority of that body, and not unsupported by testimony, it cannot be set aside by the courts, as it is only the exercise of an authority which the law vests in the Commission."

See also:

Atchison, Topeka & Santa Fe Railway Company vs. United States, 232 U. S. 199, 220, 221.

Interstate Commerce Commission vs. Illinois Central Railroad Company, 215 U. S. 452, 469-70.

CONCLUSION.

We submit that the order of the Trial Court and the Circuit Court sustaining the Interstate Commerce Commission should be affirmed.

(1) It is in accordance with a long established rule of interpretation of tariffs.

(2) It is a reasonable rule in that any other interpretation of the tariff would open the way for discrimination between shippers by differing opinions of railroad officials.

(3) The order of the Interstate Commerce Commission

in finding the route traversed as an "open" route, is an ultimate finding of fact that must mean that in the Commission's opinion, the route was available and reasonable under all the circumstances.

Respectfully submitted,

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No. 563

In the Supreme Court of the United States

OCTOBER TERM, 1930

GREAT NORTHERN RAILWAY COMPANY, PETITIONER

v.

DELMAR COMPANY, RESPONDENT

BRIEF FOR INTERSTATE COMMERCE COMMISSION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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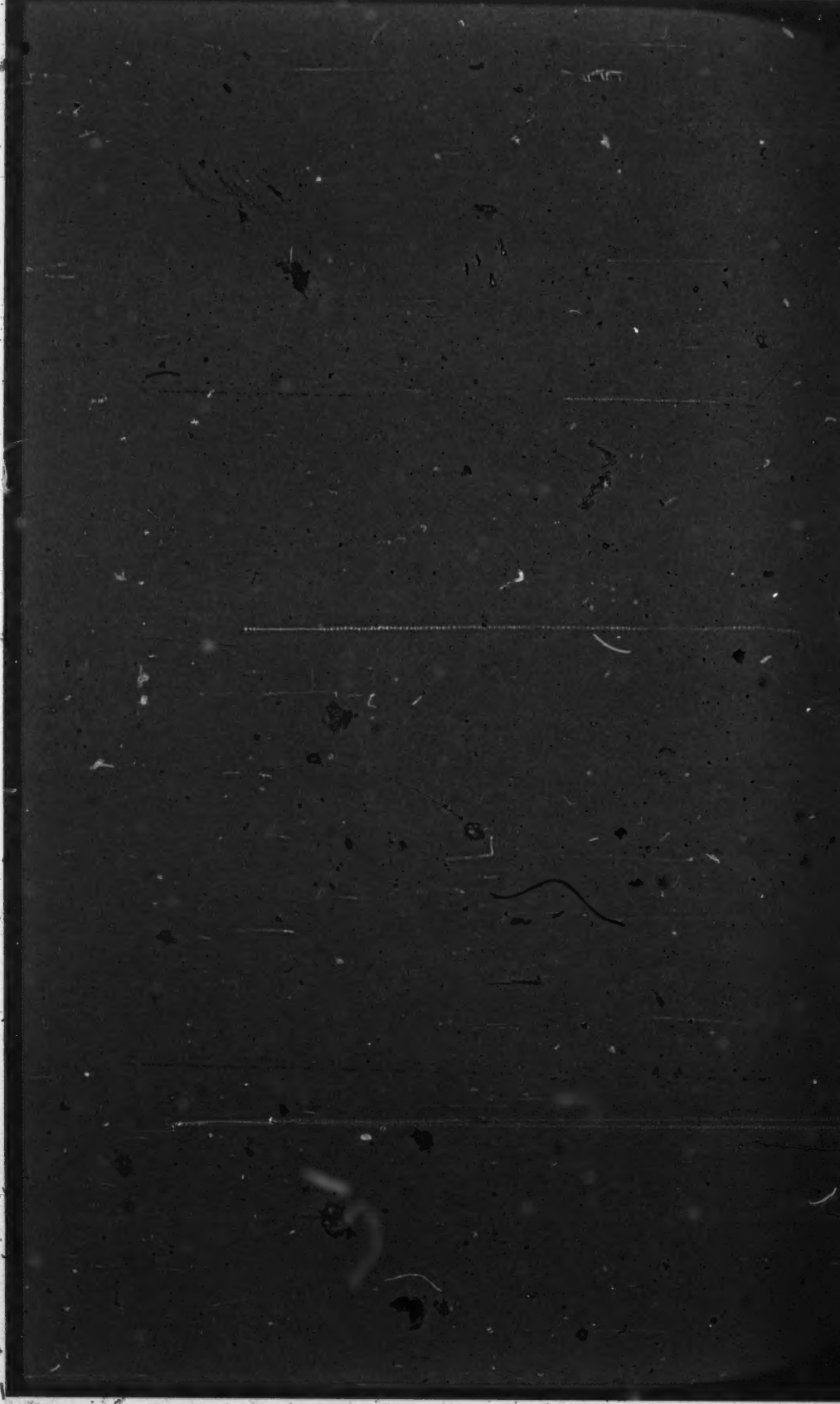
JANUARY 14, 1931.



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BRIEF FOR INTERSTATE COMMERCE COMMISSION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Pursuant to leave of Court obtained, the Interstate Commerce Commission, hereinafter called the Commission, submits this brief in support of the petition for writ of certiorari herein.

The decision of the Circuit Court of Appeals for the Eighth Circuit, review of which is sought by this petition, is reported in 43 Fed. (2d) 780, under the title of *Great Northern Railway Company* v. *Delmar Company*. (84–87.) By this decision the lower court sustained an award of reparation made by the Commission in Docket No. 16576, *Delmar Company* v. *Great Northern Railway Company*, 120 I. C. C. 530, (R. 54–62) but in so doing, we submit, construed the tariff involved in such a manner that, if it be regarded as a correct principle of the law, permits or authorizes, in certain in-

stances, the ignoring of the long-and-short-haul clause of Section 4 of the Interstate Commerce Act. (U. S. Code, Title 49, Section 4.) Further the ruling of the Court is contrary to the construction which has been followed by the Commission since Section 4 was amended in 1910. It should be understood that our only concern lies with the construction the lower court has placed on Section 4. With the Court's finding that the route over which the shipments moved was an open and unrestricted route, and that, if the carrier intended the rate to apply only over the direct route, it could easily have made a notation in its tariff to that effect, we have no dispute.

FACTS

The pertinent facts are: Numerous shipments of grain originated at points on the line of the Great Northern Railway Company in Minnesota, North Dakota and South Dakota, and were billed originally to Minneapolis, Minn. After delivery at Minneapolis, the shipments were reconsigned by the Delmar Company in the same cars to Superior, Wis., where delivery was made. The entire movement, from points of origin to Superior, was over the rails of the Great Northern. That carrier collected its local rates from origin points to Minneapolis; plus a proportional rate of 6 cents on corn, oats and rye, and 6.5 cents on wheat beyond. The direct route to Superior from the several points of origin, (excepting two, Litchfield and Rogers,

Minn.[1]) is shorter than the route traversed, via Minneapolis, and the combinations of rates exacted were higher than the rates specified in the tariffs for transporting the grain from originating points to Superior. As shown by a table in the record (R. 55) the actual haul from points of origin (again excepting Litchfield and Rogers) to Superior, range from 43.7 miles to 75.7 miles greater than the shortest mileage. In terms of percentage, the actual haul amounts to from 12 to 23 per cent more mileage than that via the shortest route. The plaintiff before the Commission (The Delmar Company) contended, and its contention was adopted by the Commission, that the rates from the points of origin to Superior applied via Minneapolis—although that was the longer distance—because the tariff did not expressly restrict the application of the rate to the shorter and more direct route. Upon this basis the Commission made its award. (R. 54–62.)

Speaking of the rule of construction employed by the Commission and in affirming the action of the District Court sustaining the award, the Circuit Court of Appeals said:

> The rule of construction employed by the Commission is that where there is more than one route from a point of origin to destination, a rate between those points applies to

[1] The Great Northern offers to refund the admitted overcharges on the shipments from Litchfield and Rogers. (R. 55.)

a shipment over any one of those routes unless that route is unreasonably circuitous or unless the carrier has limited the rate in the tariff to a particular route designated therein. This rule has been repeatedly announced and applied by the Commission. * * * Where a departmental ruling or construction has been of long standing and application, it should be accepted unless "plainly wrong." * * * This is particularly true where the subject matter of the regulation requires uniformity and is technical in character, as are railway rate tariffs. * * * The rule of tariff construction involved here is firmly established in statement and application by the Commission (cases first above cited). It should not be set aside or disregarded unless clearly opposed to law or unreasonable. The reasoning creating the rule is that the carrier may, if it has a particular route in mind for a particular tariff, easily express its intention in the tariff; that not to do so leaves the tariff difficult of construction for the shipper and the local agent of the carrier; that in opening the door for more than one meaning the tariff creates a situation where different interpretations by different local agents might result in discrimination between shippers. This reasoning impresses us as being essentially sound. Therefore, the rule of construction of the Commission should be and is approved. (R. 85–86.)

We come now to the contention of the Great Northern Railway that the rule of tariff interpre-

tation should not be adopted in this case because it would result in violations of the so-called long-and-short-haul clause of Section 4 of the Act; that is, because it would make applicable over the circuitous route rates which were lower to the more distant point than rates to intermediate points on the route. The facts of record showed (R. 30–33) that there were intermediate points on the circuitous route to which the rates were higher than the rates made applicable by the rule of tariff interpretation to the more distant point, Superior, Wis. In response to this contention of the carrier the Circuit Court of Appeals said:

> The contention of the carrier that to adopt the above rule as applied to these facts would result in a violation of the "long and short haul" clause of Section 4 of the Interstate Commerce Act (U. S. C. A. Title 49, Section 4) is not well made. That section applies to "the same line or route in the same direction, the shorter being included within the longer distance". As to these shipments, the shorter haul is not included within the longer distance. The question here is as to different routes between the same termini. The evil which that section was intended to do away with is well known and it had nothing to do with a situation such as is here presented. The construction contended for would take away all power of the carrier to select a choice of routes between the same termini unless it made a difference in the rate. It is clear that such a choice is very

often to the advantage both of the carrier and the shipping public; that there could be no useful purpose in forbidding such a choice and that it was not the intention of the above section to announce a prohibition of this character.

THE STATUTE

The pertinent provision of Section 4 reads:

(1) That it shall be unlawful for any common carrier subject to the provisions of this Act to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates subject to the provisions of this Act, but this shall not be construed as authorizing any common carrier within the terms of this Act to charge or receive as great compensation for a shorter as for a longer distance: *Provided,* That upon application to the Commission such common carrier may in special cases, after investigation, be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section; but in exercising the authority

conferred upon it in this proviso the Commission shall not permit the establishment of any charge to or from the more distant point that is not reasonably compensatory for the service performed.

ARGUMENT

The ruling of the Circuit Court of Appeals that Section 4 of the Interstate Commerce Act has no application in a case of this kind is erroneous.

The carrier urged before the Commission that the tariffs involved should be so construed as to apply only over the short route, and it was pointed out that the application of the rates in question over the longer route would produce violations of the long-and-short-haul clause of Section 4 of the Interstate Commerce Act. In the Commission's report it was, among other things, said:

> Complainant's witness testified that 20 of its shipments were reconsigned and moved through Minneapolis to Superior at the through rate. Whether cars of other shippers moved in like manner under the same rate is not shown. A witness for the Great Northern testified that the 20 cars referred to were permitted to move over the long route at the through rate by error and oversight. It appears that previously it was the custom to apply the through rate only via the direct route and to apply the proportional rate on shipments reconsigned at Minneapolis. Certain traffic difficulties and delays are encountered in moving traffic through the Minneapolis terminals that are

> not encountered over the short route. In the tariff naming rates to Duluth, rates to points between Minneapolis and Duluth, directly intermediate to Duluth, are higher than to Minneapolis and Duluth. *Under complainant's interpretation there would be a violation of the long-and-short-haul clause of the fourth section of the interstate commerce act.* [Italics ours.] (R. 57.)

Despite the fact that such interpretation would mean that the carrier was guilty of violating the long-and-short-haul clause of the fourth section, the Commission considered that such interpretation had to be given to its tariffs. After quoting from *Pioneer Lumber Co.* v. *Director General*, 74 I. C. C. 288, involving a closely analogous situation, the Commission said:

> The route from points of origin herein through Minneapolis to Superior was an open route and in the absence of restricted routing it must be found that the through rates to Duluth[*] applied over the route traversed.

The Commission's decision was, then, that the carrier's tariffs had to be interpreted in accordance with the established rule, and that, when so interpreted, they made the lower rate applicable over the circuitous route; from which it followed that the lower rate had to be applied to the shipments, since any departure from applicable tariff

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[*] Duluth and Superior appear to be one point for rate-making purposes. (R. 32.)

rates is forbidden by Section 6 and by the Elkins Act. At the same time the Commission clearly showed that it was its view that the carrier, by having in its tariffs applicable rates over the circuitous route which were lower to the more distant point than rates to intermediate points on that route, was in violation of the long-and-short-haul clause when shipments moved over that route upon which the lower rates had to be applied. The decision of the lower court is, on the other hand, to the effect that there was no violation of Section 4 involved in the situation. Its holding in this particular follows:

> (4) The contention of the carrier that to adopt the above rule as applied to these facts would result in a violation of the "long and short haul" clause of section 4 of the Interstate Commerce Act as amended (49 USCA paragraph 4) is not well made. That section applies to "the same line or route in the same direction, the shorter being included within the longer distance." As to these shipments, the shorter haul is not included within the longer distances. The question here is as to different routes between the same termini. The evil which that section was intended to do away with is well known and it had nothing to do with a situation such as is here presented. *The construction contended for would take away all power of the carrier to select a choice of routes between the same termini unless it made a dif-*

ference in the rate. It is clear that such a choice is very often to the advantage both of the carrier and the shipping public, that there could be no useful purpose in forbidding such a choice, and that it was not the intention of the above section to announce a prohibition of this character. [Italics ours.] (R. 86-87.)

As we interpret the Court's decision it holds that where a carrier has two routes between a point of origin and a point of destination and observes the provisions of Section 4 over the shorter of the two routes, it does not violate the provisions of that section if it applies that rate over the longer route and at the same time charges higher rates from and to intermediate points. If this doctrine is sound where the two routes are formed by the lines of the same carriers, it would seem that it could be claimed with equal force that it should apply where the routes are formed by two or more carriers and if such carriers have complied with Section 4 over the direct route, they would not be in violation of that section if they should apply the same rate over a circuitous route and maintain higher rates from and to intermediate points. It is hardly necessary to point out that such a construction of Section 4 would destroy its application in a large majority of the situations in which it is now held to apply.

The ruling of the lower court is contrary to that which has been taken by the Commission since Sec-

tion 4 was amended in 1910,* and seems to us to be contrary to the law involved in the application of that section.

In *United States v. Louisville & Nashville Railroad Company*, 235 U. S. 314, the Court held that after the 1910 amendment to Section 4, the authority of the railroads to primarily determine for themselves the propriety of charging higher rates for the shorter haul than for the longer haul ceased to exist and was vested in the Interstate Commerce Commission.

As we interpret the decision of the Circuit Court of Appeals it is in conflict with that of this Court in *Davis* v. *Portland Seed Company*, 264 U. S. 403, where the Court held that Section 4 of the Act is violated, and the carrier incurs prima facie at least, the penalties prescribed by Section 10, by publishing, without authority from the Commission, a lower rate for the longer haul than that scheduled for the

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* The 1910 amendment is indicated by the Italics in Section 4 as follows:

"It shall be unlawful for any common carrier subject to the provisions of this chapter to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line *or route* in the same direction, the shorter being included within the longer distance, *or to charge any greater compensation as a through rate than the aggregate of the intermediate rates subject to the provisions of this chapter*, but this shall not be construed as authorizing any common carrier within the terms of this chapter to charge or receive as great compensation for a shorter as for a longer distance."

shorter haul of the same kind of property over the same line and in the same direction.

In the case of *Skinner & Eddy Company* v. *United States*, 249 U. S. 557, the Court held that the specific purpose of Section 4 was to prevent discrimination by charging less for the longer than for the shorter haul unless in the opinion of the Commission conditions make such action just. Permission from the Commission is essential to warrant a carrier charging less for the longer than the shorter distance haul, and in the case now under review such permission was not obtained. Compare *Intermountain Rate Cases*, 234 U. S. 476; *Patterson* v. *Louisville & Nashville R. Co.*, 269 U. S. 1.

The question of whether the lower court has correctly interpreted Section 4 is one of importance to railroads and shippers alike, as well as to the Interstate Commerce Commission, and goes beyond the small sum involved in this proceeding. Other cases are now pending before the Commission, both on its informal and formal dockets, the disposition of which would be governed by the case at bar. We believe it is an important question of federal law affecting the Commission's administration of the Interstate Commerce Act and the rights of interstate shippers and carriers generally.

E. M. REIDY,
For Interstate Commerce Commission.

DANIEL W. KNOWLTON,
Of Counsel.

JANUARY 14, 1931.

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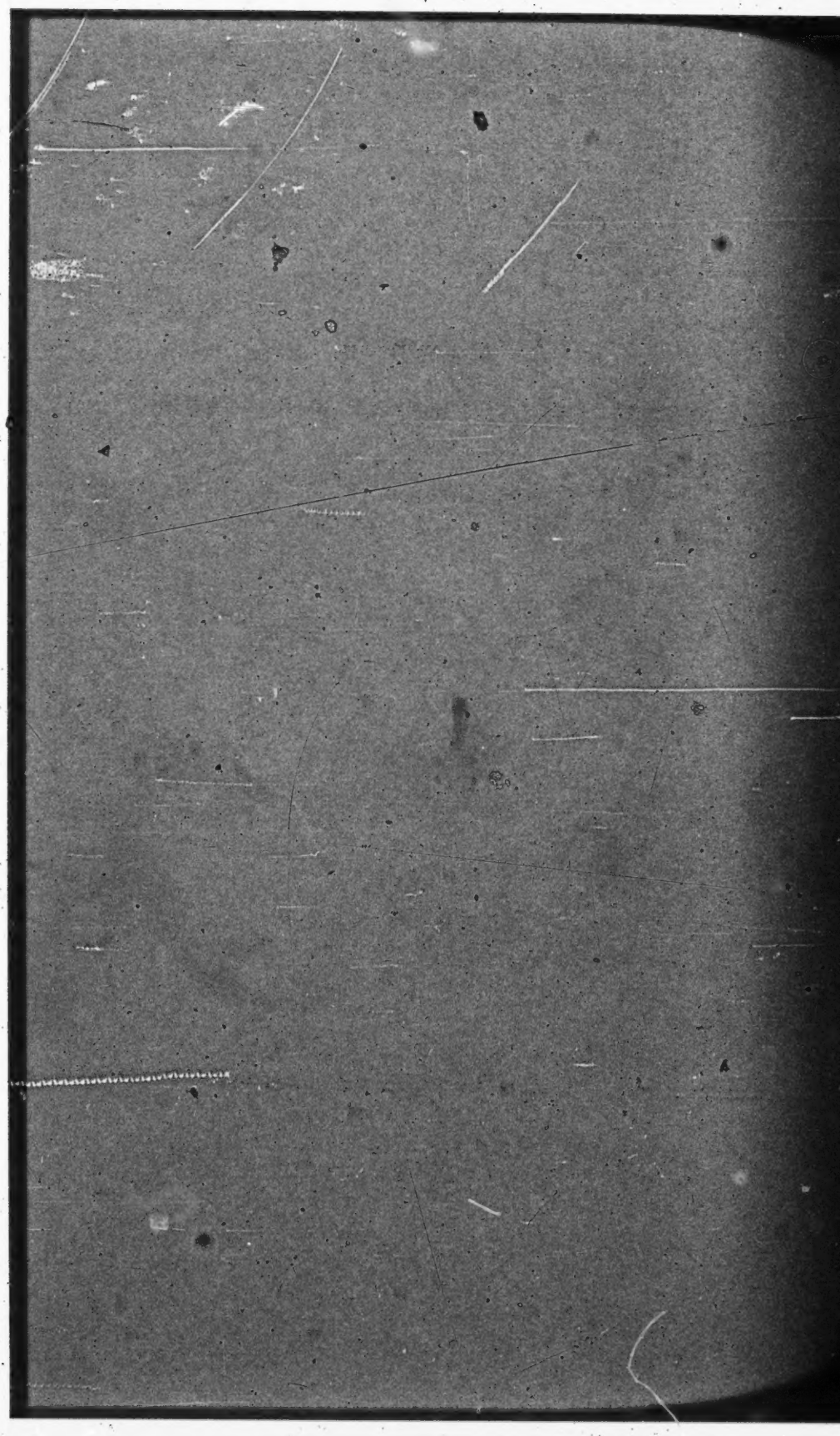

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No. 563

In the Supreme Court of the United States

OCTOBER TERM, 1930

GREAT NORTHERN RAILWAY COMPANY, PETITIONER

v.

DELMAR COMPANY, RESPONDENT

BRIEF FOR INTERSTATE COMMERCE COMMISSION

E. M. REIDY,
For Interstate Commerce Commission.

DANIEL W. KNOWLTON,
Of Counsel.

MARCH, 1931.

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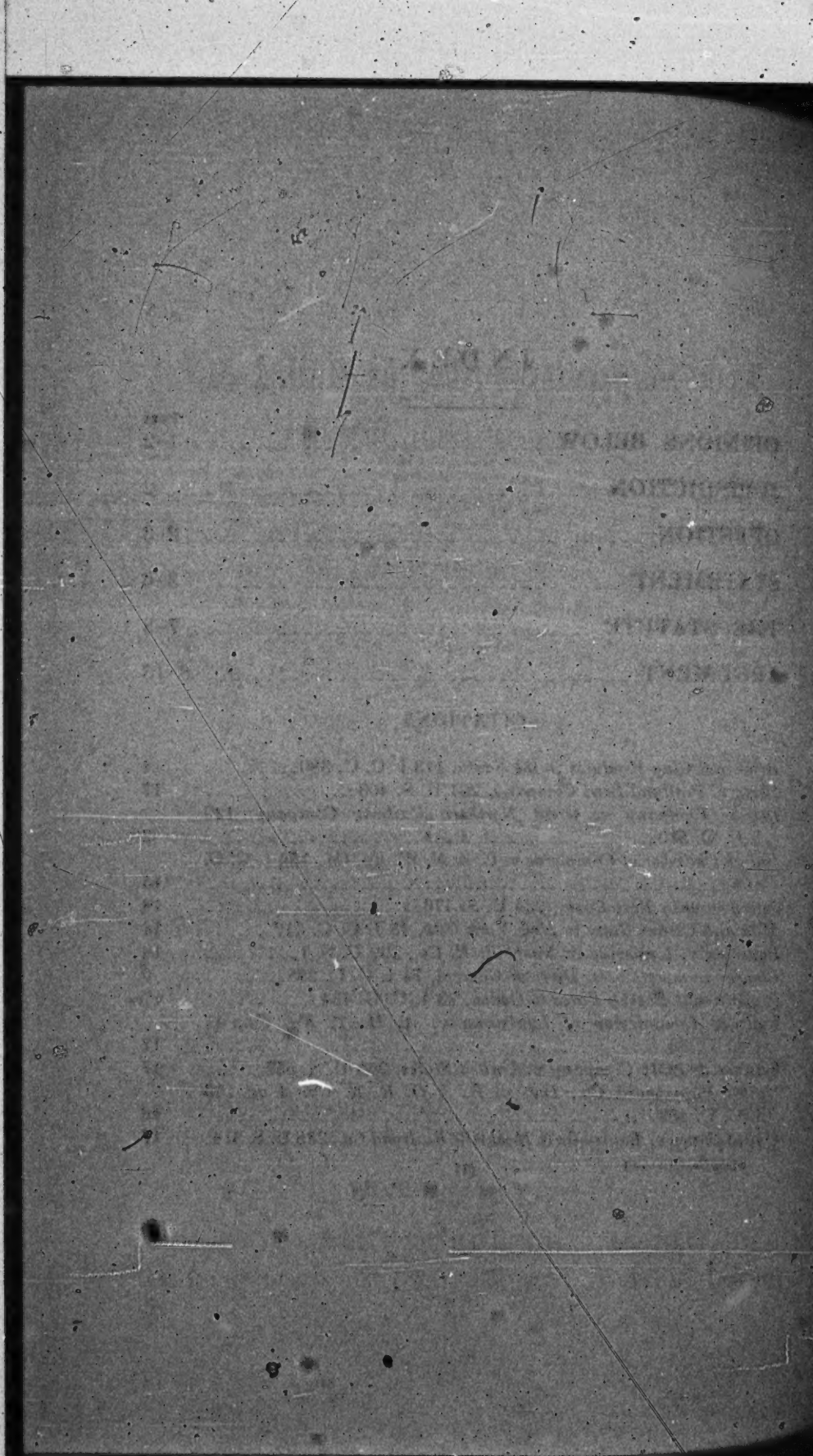

In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 563

GREAT NORTHERN RAILWAY COMPANY, PETITIONER

v.

DELMAR COMPANY, RESPONDENT

BRIEF FOR INTERSTATE COMMERCE COMMISSION

Pursuant to leave of Court obtained, the Interstate Commerce Commission, hereinafter called the Commission, submits this brief to have corrected the construction placed upon Section 4 of the Interstate Commerce Act (U. S. Code, Title 49, Section 4) by the Circuit Court of Appeals for the Eighth Circuit, the effect of which, in the opinion of the Commission, permits or authorizes, in certain instances, the ignoring of the long-and-short-haul provision of that section.

OPINIONS BELOW

The opinion of the District Court (R. 6) is reported in 34 F. (2d) 221, and the opinion of the

Circuit Court of Appeals (R. 74) is reported in 43 F. (2d) 780.

The Commission's decision is reported as Docket No. 16576, *Delmar Company* v. *Great Northern Railway Company*, 120 I. C. C. 530. (R. 51.)

JURISDICTION

The judgment of the Circuit Court of Appeals was entered September 16, 1930. (R. 78.) The petition for certiorari was filed November 24, 1930, and certiorari was granted January 19, 1931, 282 U.S. ——. (R. 78.)

QUESTION

In its decision the Circuit Court of Appeals sustained the Commission's reparation order in this case, but in so doing we think it passed upon the Commission's construction of the tariff involved in such a manner that, if it be regarded as a correct principle of the law, permits or authorizes, in certain instances, the ignoring of the long-and-short-haul clause of Section 4 of the Interstate Commerce Act. (U. S. Code, Title 49, Section 4.) Further the ruling of the Court is contrary to the construction which has been followed by the Commission since Section 4 was amended in 1910. It should be understood that our only concern lies with the construction the lower court has placed on Section 4. With the Court's finding that the route over which the shipments moved was an open and unrestricted route, and that, if the car-

rier intended the rate to apply only over the direct route, it could easily have made a notation in its tariff to that effect, we have no dispute. (R. 77.)

The question is as to the validity of the interpretation the court has placed upon Section 4. (R. 77.)

STATEMENT

The pertinent facts are: Numerous shipments of grain originated at points on the line of the Great Northern Railway Company in Minnesota, North Dakota, and South Dakota, and were billed originally to Minneapolis, Minn. After delivery at Minneapolis, the shipments were reconsigned by the Delmar Company in the same cars to Superior, Wis., where delivery was made. The entire movement, from points of origin to Superior, was over the rails of the Great Northern. That carrier collected its local rates from origin points to Minneapolis, plus a proportional rate of 6 cents on corn, oats, and rye, and 6.5 cents on wheat, beyond. The direct route to Superior from the several points of origin (excepting two, Litchfield and Rogers, Minn.,[1]) is shorter than the route traversed, via Minneapolis, and the combination of rates exacted were higher than the rates specified in the tariffs for transporting the grain from originating points

[1] The Great Northern offers to refund the admitted overcharges on the shipments from Litchfield and Rogers. (R. 82.)

to Superior. (R. 52–53.) As shown by a table in the record (R. 53) the actual haul from points of origin (again excepting Litchfield and Rogers) to Superior range from 43.7 miles to 75.7 miles greater than the shortest mileage. In terms of percentage, the actual haul amounts to from 12 to 23 per cent more mileage than that via the shortest route. The plaintiff before the Commission (The Delmar Company) contended, and its contention was adopted by the Commission, that the rates from the points of origin to Superior applied via Minneapolis—although that was the longer distance—because the tariff did not expressly restrict the application of the rate to the shorter and more direct route. Upon this basis the Commission made its award. (R. 52–59.)

Speaking of the rule of construction employed by the Commission and in affirming the action of the District Court sustaining the award, the Circuit Court of Appeals said:

> The rule of construction employed by the Commission is that where there is more than one route from a point of origin to destination, a rate between those points applies to a shipment over any one of those routes unless that route is unreasonably circuitous or unless the carrier has limited the rate in the tariff to a particular route designated therein. This rule has been repeatedly announced and applied by the Commission. * * * Where a departmental ruling or construction has been of long standing and

application, it should be accepted unless "plainly wrong." * * * This is particularly true where the subject matter of the regulation requires uniformity and is technical in character, as are railway rate tariffs. * * * The rule of tariff construction involved here is firmly established in statement and application by the Commission (cases first above cited). It should not be set aside or disregarded unless clearly opposed to law or unreasonable. The reasoning creating the rule is that the carrier may, if it has a particular route in mind for a particular tariff, easily express its intention in the tariff; that not to do so leaves the tariff difficult of construction for the shipper and the local agent of the carrier; that in opening the door for more than one meaning the tariff creates a situation where different interpretations by different local agents might result in discrimination between shippers. This reasoning impresses us as being essentially sound. Therefore, the rule of construction of the Commission should be and is approved. (R. 75–76.)

We come now to the contention of the Great Northern Railway that the rule of tariff interpretation should not be adopted in this case because it would result in violations of the so-called long-and-short-haul clause of Section 4 of the Act; that is, because it would make applicable over the circuitous route rates which were lower to the more distant point than rates to intermediate points on the route. The facts of record showed (R. 29–31)

that there were intermediate points on the circuitous route to which the rates were higher than the rates made applicable by the rule of tariff interpretation to the more distant point, Superior, Wis. In response to this contention of the carrier the Circuit Court of Appeals said:

> The contention of the carrier that to adopt the above rule as applied to these facts would result in a violation of the "long and short haul" clause of Section 4 of the Interstate Commerce Act (U. S. C. A., Title 49, Section 4) is not well made. That section applies to "the same line or route in the same direction, the shorter being included within the longer distance." As to these shipments, the shorter haul is not included within the longer distance. The question here is as to different routes between the same termini. The evil which that section was intended to do away with is well known and it had nothing to do with a situation such as is here presented. The construction contended for would take away all power of the carrier to select a choice of routes between the same termini unless it made a difference in the rate. It is clear that such a choice is very often to the advantage both of the carrier and the shipping public; that there could be no useful purpose in forbidding such a choice and that it was not the intention of the above section to announce a prohibition of this character. (R. 77.)

THE STATUTE

The pertinent provisions of Section 4 read:

> (1) That it shall be unlawful for any common carrier subject to the provisions of this Act to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates subject to the provisions of this Act, but this shall not be construed as authorizing any common carrier within the terms of this Act to charge or receive as great compensation for a shorter as for a longer distance: *Provided*, That upon application to the Commission such common carrier may in special cases, after investigation, be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section; but in exercising the authority conferred upon it in this proviso the Commission shall not permit the establishment of any charge to or from the more distant point that is not reasonably compensatory

for the service performed; and if a circuitous rail line or route is, because of such circuity, granted authority to meet the charges of a more direct line or route to or from competitive points and to maintain higher charges to or from intermediate points on its line, the authority shall not include intermediate points as to which the haul of the petitioning line or route is not longer than that of the direct line or route between the competitive points; and no such authorization shall be granted on account of merely potential water competition not actually in existence: *And provided further,* That rates, fares, or charges existing at the time of the passage of this amendatory Act by virtue of orders of the Commission or as to which application has theretofore been filed with the Commission and not yet acted upon, shall not be required to be changed by reason of the provisions of this section until the further order of or a determination by the Commission.

ARGUMENT

The ruling of the Circuit Court of Appeals that Section 4 of the Interstate Commerce Act has no application in a case of this kind is erroneous.

The carrier urged before the Commission that the tariffs involved should be so construed as to apply only over the short route, and it was pointed out that the application of the rates in question over the longer route would produce violations of the long-and-short-haul clause of Section 4 of the

Interstate Commerce Act. In the Commission's report it was, among other things, said:

> Complainant's witness testified that 20 of its shipments were reconsigned and moved through Minneapolis to Superior at the through rate. Whether cars of other shippers moved in like manner under the same rate is not shown. A witness for the Great Northern testified that the 20 cars referred to were permitted to move over the long route at the through rate by error and oversight. It appears that previously it was the custom to apply the through rate only via the direct route and to apply the proportional rate on shipments reconsigned at Minneapolis. Certain traffic difficulties and delays are encountered in moving traffic through the Minneapolis terminals that are not encountered over the short route. In the tariff naming rates to Duluth, rates to points between Minneapolis and Duluth, directly intermediate to Duluth, are higher than to Minneapolis and Duluth. *Under complainant's interpretation there would be a violation of the long-and-short-haul clause of the fourth section of the interstate commerce act.* (Italics ours.) (R. 54–55.)

Despite the fact that such interpretation would mean that the carrier was guilty of violating the long-and-short-haul clause of the fourth section, the Commission considered that such interpretation had to be given to its tariffs. After quoting from *Pioneer Lumber Co.* v. *Director General*, 74 I. C. C.

288, involving a closely analogous situation, the Commission said:

> The route from points of origin herein through Minneapolis to Superior was an open route and in the absence of restricted routing it must be found that the through rates to Duluth[1] applied over the route traversed. (R. 55.)

The Commission's decision was, then, that the carrier's tariffs had to be interpreted in accordance with the established rule, and that, when so interpreted, they made the lower rate applicable over the circuitous route; from which it followed that the lower rate had to be applied to the shipments, since any departure from applicable tariff rates is forbidden by Section 6 and by the Elkins Act. At the same time the Commission clearly showed that it was its view that the carrier, by having in its tariffs applicable rates over the circuitous routes which were lower to the more distant point than rates to intermediate points on that route, was in violation of the long-and-short-haul clause when shipments moved over that route upon which the lower rates had to be applied. The decision of the lower court is, on the other hand, to the effect that there was no violation of Section 4 involved in the situation. Its holding in this particular follows:

> (4) The contention of the carrier that to adopt the above rule as applied to these facts

[1] Duluth and Superior appear to be one point for rate-making purposes. (R. 29.)

would result in a violation of the "long and short haul" clause of Section 4 of the Interstate Commerce Act as amended (49 USCA paragraph 4) is not well made. That section applies to "the same line or route in the same direction, the shorter being included within the longer distance." As to these shipments, the shorter haul is not included within the longer distance. The question here is as to different routes between the same termini. The evil which that section was intended to do away with is well known and it had nothing to do with a situation such as is here presented. *The construction contended for would take away all power of the carrier to select a choice of routes between the same termini unless it made a difference in the rate. It is clear that such a choice is very often to the advantage both of the carrier and the shipping public, that there could be no useful purpose in forbidding such a choice, and that it was not the intention of the above section to announce a prohibition of this character.* (Italics ours.) (R. 77.)

As we interpret the Court's decision, it holds that where a carrier has two routes between a point of origin and a point of destination and observes the provisions of Section 4 over the shorter of the two routes, it does not violate the provisions of that section if it applies that rate over the longer route and at the same time charges higher rates from and to intermediate points. If this doctrine is sound where the two routes are formed by the lines of the same carriers, it would seem that it

could be claimed with equal force that it should apply where the routes are formed by two or more carriers, and if such carriers have complied with Section 4 over the direct route, they would not be in violation of that section if they should apply the same rate over a circuitous route and maintain higher rates from and to intermediate points. It is hardly necessary to point out that such a construction of Section 4 would destroy its application in a large majority of the situations in which it is now held to apply.

The ruling of the lower court is contrary to that which has been taken by the Commission since Section 4 was amended in 1910,* and seems to us to be contrary to the law involved in the application of that section.

In *Railroad Commission of Louisiana* v. *A. H. T. Ry Co.*, 41 I. C. C. 83, 123, 124, the Commission said:

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*The 1910 amendment is indicated by the Italics in Section 4 as follows:

"It shall be unlawful for any common carrier subject to the provisions of this chapter to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line *or route* in the same direction, the shorter being included within the longer distance, *or to charge any greater compensation as a through rate than the aggregate of the intermediate rates subject to the provisions of this chapter*, but this shall not be construed as authorizing any common carrier within the terms of this chapter to charge or receive as great compensation for a shorter as for a longer distance."

In many instances circuitous lines in Texas meet the rates made upon a mileage scale by the direct lines at competitive points, but carry higher rates at intermediate points. In establishing rates from Shreveport to Texas points that will harmonize with the rates from near-by points in Texas to the same destinations, it may be that relief from the provisions of the fourth section of the act to regulate commerce will be necessary.

Carriers operating circuitous routes between Shreveport and Texas points and desiring to meet at competitive points the rates made by the direct lines while maintaining higher rates to intermediate points, will be expected to make application to the Commission for authority to do so.

Many of the rates between Shreveport and Texas points exceed the sums of the intermediate rates via Waskom or some other Texas point. If both intermediates are subject to the act to regulate commerce, through rates which are higher than the aggregate of the intermediate rates are in violation of the fourth section. In those instances in which rates between two Texas points are filed with this Commission for use in making up interstate rates they become component parts of through interstate rates and are therefore subject to the act.

The disposition above outlined and the orders in *Through Rates to Points in Louisiana and Texas*, 38 I. C. C. 153, will correct

the violations to which our attention has been directed.

If the rates between Shreveport and Texas points are reduced to the level of the Shreveport scale or any scale approximating it, the rates now in effect between Foster, La., and other Louisiana points, on the one hand, and points in Texas on the other, will be greatly out of proportion to the rates between Shreveport and the same Texas points, and in some instances will be higher than the aggregate of the intermediate rates to and from Shreveport. We make no order at this time respecting the rates between these Louisiana points and Texas, but the carriers will be expected to readjust these rates to harmonize with those herein found reasonable between Shreveport and Texas points. If this is not done the matter may be brought to our attention by appropriate proceedings.

In *Milk and Cream Rates to New York City*, 45 I. C. C. 412, at pages 431–2, the following appears:

* * * Where circuitous lines desire to meet the rates based upon the distances from competitive points over the direct routes, and to maintain higher rates from intermediate points, applications for relief from the provisions of the fourth section of the act should be filed.

The Commission, in *Brick and Clay Products in the South*, 113 I. C. C. 380, 381–2, said:

Section 4 of the act provides that, in exercising the authority conferred upon us to grant relief from the long-and-short haul re-

quirements of that section, we shall not permit the establishment of any charge to or from the more distant point that is not reasonably compensatory for the service performed. The rates over the direct routes are those prescribed by us as reasonable maximum rates. In our opinion such rates would not, if applied over routes of substantially greater circuity than the maxima prescribed in our fourth-section order, be reasonably compensatory for the service performed. Furthermore, and apart from this requirement of the law, section 15 (a) provides that carriers are entitled to the fair return there prescribed "under honest, efficient and economical management." The unnecessary hauling of traffic over unduly circuitous routes at the same rates that are applicable over direct routes results in wasteful transportation. It is manifest, however, that publication of all routes over which the rates apply would impose upon respondents tremendous labor and expense and would result in such increase in bulk of tariffs as to render them cumbersome and difficult to use. The problem, therefore, is to devise some means of limiting the application of the rates to reasonably direct routes without specific publication of such routes.

In *Duluth Chamber of Commerce* v. *C. & N. W. Ry. Co.*, 156 I. C. C. 156, 165–6, it was said:

The second order made by division 2 was directed against all defendants according as they participated in the transportation, thus

requiring defendants operating over circuitous routes to establish rates over such routes on the same basis as was prescribed over the direct routes. Defendants ask that the order be modified to permit defendants whose lines are more than 15 per cent circuitous to withdraw from participation in the traffic. Our finding and order hereinafter made will require the establishment of the rates found reasonable only over the shortest routes as defined. Upon appropriate application the matter of fourth-section relief to enable lines or routes more than 15 per cent circuitous to meet the rates over the short lines or routes and to maintain higher rates at intermediate points will be given consideration.

And in *United Paperboard Co., Inc.*, v. *B. & O. R. R. Co., et al.*, 153 I. C. C. 453, 455–6, it was said:

As the result of a further hearing in the *South Bend Chamber of Commerce case, supra,* reported in 61 I. C. C. 67, the carriers were granted fourth-section relief to maintain class and commodity rates to Elkhart lower than rates to intermediate points in Indiana except in those instances where the equidistant clause of the fourth section operated to prevent relief. Some of complainant's shipments moved over routes as to which the distance to Wabash is less than the short-line distance to Elkhart. The maintenance of rates to Wabash over these routes was therefore contrary to the terms of the fourth-section order referred to, and not being otherwise authorized by us was in violation of the fourth section of the act.

> Complainant also contends that there are lower rates in effect to Anderson and Marion over routes through Wabash. Practically all of these violations have since been removed, and defendants are arranging to eliminate promptly any which may still exist.

See also *Proportional Basing Fares to Ogden*, 73 I. C. C. 434.

This Court has had before it the construction of Section 4 of the Act in a number of cases.

In *United States* v. *Louisville & Nashville Railroad Company*, 235 U. S. 314, the Court held that after the 1910 amendment to Section 4, the authority of the railroads to primarily determine for themselves the propriety of charging higher rates for the shorter haul than for the longer haul ceased to exist and was vested in the Interstate Commerce Commission.

As we interpret the decision of the Circuit Court of Appeals it is in conflict with that of this Court in *Davis* v. *Portland Seed Company*, 264 U. S. 403, where the Court held that Section 4 of the Act is violated, and the carrier incurs, prima facie at least, the penalties prescribed by Section 10, by publishing, without authority from the Commission, a lower rate for the longer haul than that scheduled for the shorter haul of the same kind of property over the same line and in the same direction.

In the case of *Skinner & Eddy Company* v. *United States*, 249 U. S. 557, the Court held that the specific purpose of Section 4 was to prevent

discrimination by charging less for the longer than for the shorter haul unless, in the opinion of the Commission, conditions make such action just. Permission from the Commission is essential to warrant a carrier charging less for the longer than for the shorter distance haul, and in the case now under review such permission was not obtained. Compare *Intermountain Rate Cases*, 234 U. S. 476; *Patterson* v. *Louisville & Nashville R. Co.*, 269 U. S. 1.

The question of whether the lower court has correctly interpreted Section 4 is one of importance to railroads and shippers alike, as well as to the Interstate Commerce Commission, and goes beyond the small sum involved in this proceeding. Other cases are now pending before the Commission, both on its informal and formal dockets, the disposition of which would be governed by the case at bar.

The construction the lower court has placed on Section 4 is plainly erroneous, contrary to long-continued interpretation of the Section by this Commission, and, if allowed to stand, will seriously interfere with the Commission's administration of the Section. To that extent we think the lower court's opinion should be modified.

E. M. Reidy,

For Interstate Commerce Commission.

Daniel W. Knowlton,

Of Counsel.

March, 1931.

U. S. GOVERNMENT PRINTING OFFICE: 1931

SUPREME COURT OF THE UNITED STATES.

No. 563.—October Term, 1930.

Great Northern Railway Company, Petitioner, vs. Delmar Company.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[May 25, 1931.]

Mr. Justice Roberts delivered the opinion of the Court.

The Interstate Commerce Commission awarded Delmar Company reparation against the Great Northern Railway Company for certain charges made on shipments of grain.[1] Suit was brought on the award and judgment rendered against the railway by the District Court. On appeal to the Circuit Court of Appeals that judgment was affirmed.[2] This Court granted certiorari.[3]

The pertinent facts are that numerous shipments of grain originated at points on the line of the railway in Minnesota, North Dakota and South Dakota. They were originally billed to Minneapolis. After arrival there they were reconsigned by the Delmar Company, in the same cars, to Superior, Wis., where delivery was made. The entire movement from the points of origin to Superior was over the rails of the Great Northern. The shorter route from the places of shipment to Superior is via Willmar. The longer, which the cars in question traveled,—via Minneapolis,—involves passage through the congested railroad terminals in that city, with incident traffic difficulties and delays not encountered on the more direct one. The difference between the two in mileage from the shipping points to Superior varies by from 12 to 23 per cent. The carrier collected its local rates from origin points to Minneapolis, plus a proportional rate of 6.5 cents beyond. The combinations of rates so exacted were higher than the through rates specified in the tariffs for the transportation of grain from these points to Superior.

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[1] 128 I. C. C. 530.
[2] 43 F. (2d) 780.
[3] 282 U. S. —.

The Commission found that it had previously been the custom to apply the through rate only upon shipments via the direct route, and to apply the proportional rate beyond Minneapolis to such as were reconsigned at that point. The advantage to the Delmar Company of originally consigning to that city and reconsigning to Superior is that the former is a grain market, and the grain may be sold en route and delivered at Minneapolis pursuant to such sale, or reconsigned if not sold on its arrival.

It is conceded that the shipper had the right of reconsignment without additional charge for that privilege, and that the situation is the same as if the shipments had originally been billed to Superior via Minneapolis.

The Commission sustained the contention of the Delmar Company that the quoted through rates from points of origin to Superior applied to shipments routed via Minneapolis, since the tariff did not expressly restrict their application to the shorter and more direct route via Willmar. This finding was the basis of the award of reparation.

The railway maintains that in the circumstances here presented the tariff may not be so construed as to render the specified through rate applicable to shipments by way of Minneapolis. This would be contrary to established custom and would occasion violation of the long-and-short-haul clause of the Interstate Commerce Act.

The Commission has repeatedly decided that where two or more routes are "open", which means that in the judgment of the Commission none of them is unreasonably circuitous, the shipper has the option as to route, at the quoted rate, in the absence of a contrary statement in the tariff. *Van Dusen Harrington Co.* v. *C. M. & St. P. Ry. Co.*, 47 I. C. C. 59; *Meeds L. Co.* v. *Director General*, 59 I. C. C. 243; *Freeman Grain Co.* v. *Director General*, 68 I. C. C. 559; *Baker-Reid L. Co.* v. *B. & O. R. R. Co.*, 74 I. C. C. 489; *Steinhardt & Kelly* v. *Erie R. R. Co.*, 96 I. C. C. 229; *Scott County Farm Bureau* v. *A. & V. Ry. Co.*, 101 I. C. C. 357; *Browne-Hinton Wholesale Grocery Co.* v. *Great Northern Ry. Co.*, 102 I. C. C. 237; *Northwestern Fruit Exchange* v. *Great Northern Ry. Co.*, 128 I. C. C. 538; *Atwood Davis Sand Co.* v. *C. N. W. Ry. Co.*, 136 I. C. C. 471. Here the difference is, in no instance, more than 23 per cent. It is claimed that the longer route is more burdensome, due to congestion at Minneapolis, but there is no definite

evidence and no finding on this point. We cannot say that there was error in the Commission's conclusion that the longer route was not unreasonably circuitous.

It is undisputed that there are destinations on the railway's line between Minneapolis and Superior as to which the rate from the points of origin, consisting of the local rate to Minneapolis plus the proportional rate beyond that city, is greater than the quoted through rate from such points to Superior. Consequently if shipments should be made to Superior via Minneapolis at the through rate, they will be carried for less than would be charged for similar shipments to these intermediate destinations. The railway insists that this would result in violations of Section 4 of the Interstate Commerce Act.[4] That section is in part:

"It shall be unlawful for any common carrier . . . to charge or receive any greater compensation in the aggregate for the transportation . . . of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates subject to the provisions of this chapter, but this shall not be construed as authorizing any common carrier within the terms of this chapter to charge or receive as great compensation for a shorter as for a longer distance: . . ."

The Commission decided that while the facts recited would render the railway liable for the penalties prescribed by the act, the tariff rate must be applied. The Circuit Court of Appeals, under what we think was a misapprehension of the facts, held no violation of Section 4 would result. It said:

"That section applies to 'the same line or route in the same direction, the shorter *being included within* the longer distance.' As to these shipments, the shorter haul is not included within the longer distance."

The quotation indicates a failure to note the fact that the comparison of rates is made between points which are all upon the longer of the two routes, and that the shorter distance on that line is included within the longer distance to Superior. The Commission filed a brief in this Court taking issue with the conclusion of the Court of Appeals on this feature of the case.

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[4]U. S. C., Tit. 49, § 4 (1).

The railway can transport the shipments over the shorter and customary route without violating Section 4; but if the tariff is construed to require it to take them over the longer route it must violate that section and incur the resulting penalties. In this situation we think the tariff should be construed as applying only to the shorter route, and not as giving the shipper the option between the two routes at the through rate. This conclusion is in accord with the principle that where two constructions of a written contract are possible, preference will be given to that which does not result in violation of law. (Compare *Wilson* v. *Rousseau*, 4 How. 646, 685; *Hobbs* v. *McLean*, 117 U. S. 567, 576; *In re Rose Co.*, 275 Fed. 409; *No. Pac. Ry.* v. *St. Paul & Tacoma Lbr. Co.*, 4 F. (2d) 359.)

The judgment is reversed and the cause remanded for further proceedings in conformity with this opinion.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.